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of all Forms of
Racial Discrimination

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COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Fifty-fourth session

SUMMARY RECORD OF THE FIRST PART (PUBLIC)* OF THE 1322nd MEETING

Held at the Palais des Nations, Geneva,
on Friday, 12 March 1999, at 10 a.m.

Chairman: Mr. ABOUL-NASR

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Twelfth to fifteenth periodic reports of Costa Rica (continued)

* The summary record of the second part (closed) of the meeting appears
as document CERD/C/SR.1322/Add.1.

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record. They should be sent within one week of the date of this document to
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Any corrections to the records of the public meetings of the Committee
at this session will be consolidated in a single corrigendum, to be issued
shortly after the end of the session.

The meeting was called to order at 10.10 a.m.

CONSIDERATION OF REPORTS, COMMENTS AND INFORMATION SUBMITTED BY STATES PARTIES
UNDER ARTICLE 9 OF THE CONVENTION (agenda item 4) (continued)

Twelfth to fifteenth periodic reports of Costa Rica (continued)
(CERD/C/338/Add.4)

1. At the invitation of the Chairman, the members of the delegation of Costa Rica resumed their places at the Committee table.
2. The CHAIRMAN invited the members of the Committee to put additional questions to the delegation of Costa Rica.
3. Mr. GARVALOV said he agreed with other members of the Committee that the oral presentation of the head of the Costa Rican delegation was at least as important as the written report itself.
4. He noted that, according to paragraph 5 of the report (CERD/C/338/Add.4), it was "an absolute imperative in the Costa Rican legal system that persons who are in similar situations must receive equal treatment" and that "the rule was to be understood as making it a requirement to treat equally all persons who belong to a particular category and are in an equivalent situation". He wondered what exactly was meant by the term "category" and whether the legislation of the State party guaranteed equal treatment to all citizens regardless of the "category" to which they belonged.
5. Likewise, in the last sentence of paragraph 76, the accepted meaning of the term "country" was unclear. Did the term refer to the constitutional legislative, judicial and executive branches, and did it mean that those authorities had ascertained that there was no discrimination or that they had affirmed that there was none?
6. He found an inconsistency between the wording of paragraphs 84, 88 and 90 of the report, which said that the law penalized ("sanciona") any form of racial discrimination, and that of paragraph 89, which said that the law discouraged ("desestimula") any racial segregation.
7. Mr. SHERIFIS said that the oral presentation of the head of the Costa Rican delegation could in essence be considered a supplementary report.
8. Concerning Act No. 4430 of 21 May 1968 cited in paragraph 89 of the report, which made the offence of segregation punishable by a fine, he wondered if action had been taken to compensate for the fact that the amount of the fine had become insignificant because of monetary fluctuations.
9. He would like to have further information on the question of refugees, dealt with in paragraphs 9 to 17 of the report, given the number of refugees and therefore the magnitude of the problem. His concern was that the refugees were subjected to racial discrimination on the part of the population, given the popular belief, referred to in paragraph 10 of the report, that there was an "ethnic difference" between Costa Ricans and other Central Americans. What were the authorities doing to combat that prejudice?

10. He was also surprised that Costa Rica had not given details about the implementation of article 7 of the Convention, as requested during the consideration of the previous report. He would appreciate information on steps taken by the Government to mobilize public opinion and promote the objectives of the Convention.

11. He asked if Costa Rica had ratified the amendment to article 8, paragraph 6, of the Convention and, if not, if it intended to do so.

12. The CHAIRMAN said that he took it the members of the Committee had no more questions to ask and invited the Costa Rican delegation to take the floor.

13. Mr. DIAZ-PANIAGUA (Costa Rica) agreed that there was some awkward wording in the report. However, his oral presentation had enabled him to clarify certain points.

14. Regarding Mr. Sherifis' question on what had been done to compensate for the weakening of the penalty stipulated for acts of racial segregation, article 371 of the Criminal Code provided for fines that varied according to the income of the perpetrators and certain economic indicators such as the current minimum wage. Furthermore, if the accused owned a business, the judge could order the establishment to be closed down. It could therefore be said that the law effectively punished acts of racial discrimination.

15. In answer to Mr. de Gouttes' question whether there were any legal texts penalizing participation in international organizations that advocated recourse to acts of racial discrimination, he indicated that under article 372 of the Criminal Code, any person who participated, as a leader or a member, in activities of an international organization that engaged in acts contrary to the provisions of the international treaties to which Costa Rica was a party was subject to 15 to 20 years' imprisonment. However, to his knowledge, no case had been brought on those grounds during the period under consideration.

16. He agreed that the report was silent on the implementation of article 7 of the Convention. Some attempts at implementation had been made, in collaboration with governmental and non-governmental organizations, in certain regions. Programmes had been set up by the Department of Indigenous Education, to teach cultural diversity.

17. In answer to Ms. Sadiq Ali who had inquired about the status of the proposed Act for the Autonomous Development of the Indigenous Peoples, it was making headway and the prospects for its adoption were reportedly good.

18. Regarding Mr. Yutzis' question concerning the case of Mrs. Zelaya and her two daughters referred to by Amnesty International, he explained that Mrs. Zelaya had entered Costa Rica in February 1996 with her children and had obtained refugee status. In September 1996, she had submitted a complaint to the Office of the Ombudsman on the grounds of harassment and threats by Honduran security forces operating on Costa Rican territory. An inquiry had been conducted and concluded without uncovering any evidence to support the complaint. Eight days after the complaint had been filed, the Special

Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions had addressed a letter to the Costa Rican authorities informing them that Mrs. Zelaya was filing a complaint against the Government of Costa Rica. Shortly thereafter, Mrs. Zelaya had left the country for Europe. In the event, his Government had given refuge to Mrs. Zelaya out of purely humanitarian considerations, and there was no compelling evidence that she had been a victim of racial discrimination.

19. In answer to another question by Mr. Yutzis concerning the delegation's statement that views differed among the organizations working to defend the indigenous people and among the various groups claiming to represent them, he said that the delegation had, in the interest of transparency, wanted to inform the Committee about a situation that did not facilitate the implementation of the Convention. There had in fact been disputes among indigenous groups and associations over contested appointments of tribal chiefs. Also, in 1997, the National Indigenous Affairs Commission (CONAI) had submitted a case to the Constitutional Court, accusing the executive branch of wanting to stifle it and do away with it. The Ministry of Culture for its part had accused CONAI of being unrepresentative, acting without a clear strategy and wasting the funds at its disposal. Similarly, the Supreme Electoral Tribunal had spoken of a "sabotage" of the electoral process.

20. All those disputes were before the courts, but since it represented the Government, the delegation was not in a position to speak in favour of one or the other side. It was best to allow the disputes to be settled democratically while ensuring that indigenous rights were respected.

21. As to the role of the Constitutional Court, it had several methods of determining whether or not the cases brought to it involved racial discrimination. However, in matters having to do with the rules of judicial proceedings such as the burden of evidence or the presumption of innocence, the Court, as an independent body, fully observed the basic principles of the law.

22. Concerning Mr. Sherifis' comments about the superiority that Costa Ricans felt with regard to other Central American peoples, that was a fact, and the State had taken steps in that regard, especially by launching awareness campaigns.

23. That said, it should be noted that despite the attitude of the population, Costa Rica had welcomed many immigrants throughout its history and made it relatively easy for them to obtain citizenship.

24. At any rate, important changes were taking place that were transforming the situation in positive ways.

25. Mr. GUILLERMET (Costa Rica), answering questions about the situation of the indigenous population of Costa Rica, said that the Office of the Ombudsman believed that the question of land tenure was the most acute problem facing the indigenous peoples of Costa Rica. A project to recover indigenous land had been assigned to institutions reporting to CONAI, which could, in particular, finance expropriations on behalf of indigenous people. Its

treasury had been empty for three years, but while it awaited renewed funding, CONAI was engaged mainly in assessing the value of the land to be redistributed to the indigenous communities.

26. According to figures published by CONAI in 1990, the proportion of indigenous landowners ranged from 80 to 100 per cent in eight zones situated in the indigenous reservations of the Atlántica region. More recent figures indicated that 15 per cent of the lands in the indigenous reservations were still in other hands. There were plans to launch a major project for the autonomous development of the indigenous population, which would include a special fund to finance expropriations. CONAI had in 1995 had a budget of over 150 million colones (1 million United States dollars) for the buy-back of land situated in indigenous reservations. In its budget for the period 1996-1997, the Institute for Agrarian Development had allocated 24 million colones for the purchase of such lands. No cut-off date had been set for the expropriations.

27. With reference to education, CONAI had calculated that there were 5,123 pupils attending 119 schools in 1997. Since then, 28 new schools had been opened, with 5,397 pupils and 243 bilingual teachers. Note should be taken of a bill to expand the Department of Indigenous Affairs within the Ministry of Public Education, which had been set up within the framework of the National University. The Department was operating a training programme for specialists and teachers of indigenous origin that was based on the culture and thinking of the indigenous communities.

28. The Government was endeavouring to protect the indigenous reservations by declaring that they constituted inalienable community lands, with a view above all to preventing their use as collateral by financial institutions. In order to help indigenous producers to obtain loans, it applied the law on the autonomous development of indigenous populations and especially the law on cooperatives, which promoted the organization of community cooperatives to improve access to credit. Other agricultural development projects aimed to help indigenous producers to buy farm machinery, especially through the special financing fund set up mainly to grant loans to indigenous communities.

29. Concerning welfare benefits, indigenous producers were not covered by an autonomous regime since the State had a monopoly over social security in Costa Rica. They could, however, join the national system through their cooperatives.

30. With regard to the armed group of public security officers whose members had killed several indigenous people in the Talamanca region, those guilty had been brought to trial and sentenced to from 3 to 42 years' imprisonment.

31. In the area of health, the main difficulties stemmed from the isolation of the communities living in the indigenous reservations. To remedy the situation, the health authorities were operating a programme to expand basic health care by bringing the health centres and health workers closer to the indigenous communities. A training programme in a combination of traditional and Western medicines had been set up in the communities.

32. Regarding the publicity given to the Convention, the Office of the Ombudsman, which received and reviewed complaints concerning human rights violations submitted by both Costa Rican citizens and any individuals living in Costa Rican territory, was also responsible for publicizing the provisions of the Convention and for promoting a culture of respect for human rights. It worked together with the National Commission for the Administration of Justice and the Constitutional Court on programmes to promote the principle of equality set out in article 33 of the Constitution.

33. Mr. PENROD (Costa Rica), replying to a question by Mr. Yutzis about access for immigrants to basic health services, said that the health system was one of the key factors of human development in Costa Rica. Essential services (distribution of medical supplies, emergency care, hospitalization) were administered by the National Social Security Fund, to which all workers, whether immigrants or not, were obliged to contribute. Foreigners in an irregular situation could, if they were wage-earners or self-employed, join that scheme if they so wished by making contributions proportional to their income. The State undertook to provide basic health and emergency care to persons with low incomes and to all needy immigrants and their families.

34. He stressed the principle that any child born on territory of Costa Rica automatically acquired the nationality of the country, regardless of that of its parents or of their immigrant status. The same applied to children of unknown parentage. Article 13 of the Constitution provided that a child born of foreign parents and registered as Costa Rican, at the wish of its parents while a minor or from its own choice before reaching 25 years of age, was Costa Rican by birth.

35. Regarding access to education, article 78 of the Constitution provided that primary education, as well as nursery schooling and secondary education, was obligatory and free, and to be provided by the State. According to UNDP figures, 95 per cent of the adult population was literate; education facilities were open to foreign minors with no restriction, and all children of low-income families were supported by a programme of economic assistance subsidized by the State, irrespective of nationality.

36. On the subject of ensuring publicity about immigrants' recognized rights, article 19 of the Constitution and article 64 of the General Act on Migration and Aliens provided that aliens had the same rights and duties as Costa Ricans. As a result of the forum on migrant populations organized by the Office of the People's Advocate in collaboration with the Inter-American Human Rights Institute, the World Migration Organization had recently launched an information and promotion campaign in order to inform immigrants from Central America about the conditions required in order to benefit from the amnesty proclaimed by the Costa Rican Government. The campaign had been launched in collaboration with civil society and non-governmental organizations, including CARITAS, with a view to enabling clandestine immigrants to regularize their situation. The General Department for Migration and Aliens was collaborating fully with the media in order to disseminate information about the amnesty procedures as widely as possible.

37. The Office of the People's Advocate was coordinating a standing forum on migrant populations with a view to establishing a national policy with regard

to migrants, with the participation of representatives of civil society, public institutions and migrants. It was also organizing training programmes, for members of the police forces, dealing with respect for immigrants' basic rights.

38. With regard to the deporting of aliens illegally in the country, that measure had been abrogated by the Amnesty Decree of November 1998; pursuant to the General Act on Migration and Aliens, various categories of tourist visas were issued, taking into account objective considerations such as health and security, but not national origin. There were only two persons from Sierra Leone on Costa Rican territory who had refugee status. A Costa Rican consulate had been opened in Cuba to handle visa requests by persons from that country.

39. Mr. DIAZ-PANIAGUA (Costa Rica) thanked the Committee for having allowed his delegation an opportunity to present the Costa Rican Government's policy relating to the Convention's implementation.

40. The CHAIRMAN, speaking as a member of the Committee, commended Costa Rica on its record concerning respect for human rights, which had earned it an excellent reputation in the United Nations. He recalled that Costa Rica had lobbied strongly for the creation of the post of High Commissioner for Human Rights as part of the Organization's system for upholding human rights, an initiative now welcomed by all. Costa Rica was thus particularly well placed to propose that other member States of the Human Rights Commission of the Organization of American States should consider apologizing to America's indigenous peoples, as well as to Afro-Americans, for the various forms of harm to which they had been subjected in the past. Payment of compensation could be discussed in the context of the forthcoming World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

41. Mr. YUTZIS (Country Rapporteur) said that he welcomed the efforts made by Costa Rica to clarify certain aspects of questions stemming from its report. Therefore, the Committee hoped that the delegation would impress upon the Government the vital importance of submitting the next periodic report on time.

42. It seemed to him that there was some imbalance, in Costa Rica, between the development evident in the country, reflected in growing GDP and falling unemployment, and the relative lack of effort made to fulfil the obligations stemming from the Convention, particularly with regard to protecting the most vulnerable population group, namely, the indigenous people.

43. Although the delegation had strongly stressed, in its oral statement, that an act on the independent development of indigenous populations was being drafted, the Committee still did not know when that text would be completed and adopted. Likewise, the delegation had stated that prison sentences ranging from 3 to 40 years had been handed down in connection with the Talamanca case; but there, too, the Committee was unaware whether the sentences were final or were subject to appeal. Costa Rica's next report should give more specific information on steps taken to implement article 4 of the Convention, which stipulated that "States parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of

one race or group of persons". In fact, article 4 condemned not only racist acts committed by individuals but also and especially those that institutions might commit.

44. The constitutionality of treating individuals differently under the law according to criteria defined by the Constitutional Court was not at issue. However, the burden of proof was perhaps not the same for all, and he wondered how some sectors of the population, especially those with neither the resources nor the experience nor the capability required, could defend themselves fairly.

45. Other questions were still pending, especially the issue of what the Government intended to do to treat the different categories of immigrants and refugees on an equal footing.

46. Mr. DIAZ-PANIAGUA (Costa Rica) said, in answer to Mr. Yutzis, that during the Talamanca trial four appeals had been rejected.

47. The CHAIRMAN said that the Committee had concluded its consideration of the twelfth to fifteenth periodic reports of Costa Rica.

48. The delegation of Costa Rica withdrew.

The public part of the meeting rose at 11.35 a.m.



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COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Fifty-fourth session

SUMMARY RECORD OF THE 1323rd MEETING

Held at the Palais des Nations, Geneva,
on Friday, 12 March 1999, at 3 p.m.

Chairman: Mr. ABOUL-NASR

later: Mr. SHERIFIS

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PREVENTION OF RACIAL DISCRIMINATION, INCLUDING EARLY WARNING MEASURES AND
URGENT ACTION PROCEDURES (continued)

Australia

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GE.99-40873 (E)

The meeting was called to order at 3.10 p.m.

PREVENTION OF RACIAL DISCRIMINATION, INCLUDING EARLY WARNING MEASURES AND
URGENT ACTION PROCEDURES (agenda item 3) (continued)

Australia (CERD/C/347)

1. At the invitation of the Chairman, Mr. Goledzinowski, Mr. Orr and Ms. Bicket (Australia) took places at the Committee table.

2. Mr. GOLEDZINOWSKI (Australia) referred the Committee to the announcement of the appointment of William Jonas as the Aboriginal and Torres Strait Islander Social Justice Commissioner with the Human Rights and Equal Opportunity Commission for a period of five years starting on 6 April.

3. In 1998, his Government had invited the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to visit Australia. Originally planned for May 1998, the visit had had to be postponed, but since then, the Special Rapporteur had indicated that, given certain positive developments in Australia, to which he had also referred in his report to the General Assembly in 1998, a visit to Australia was currently of low priority and was unlikely in 1999.

4. Mr. ORR (Australia) recalled that in 1992, the High Court of Australia had handed down its Mabo decision, which for the first time had recognized the traditional land rights, known as native title rights, of Australia's indigenous people. From the time of British settlement in 1788 until the Mabo decision, common law had held that Australia's indigenous people had no such rights. Australia had been said to be terra nullius, i.e. land belonging to no one. The Mabo decision had overturned that great injustice. The Court's decision had to a large extent been based on international legal thinking, including on racial discrimination. But although the Court had held that native title rights had survived the acquisition of sovereignty by the British, it had also found that native title had been extinguished during the gradual development of the colony by the construction of public works, such as roads and schools, and by grants to settlers, such as freehold and leasehold grants. As the judges in the Mabo case had noted, the dispossession of Australia's indigenous people and the extinguishment of their rights had underwritten the development of the nation.

5. The Native Title Act, passed by the Commonwealth Parliament in 1993, had sought to incorporate the law of native title into Australian law. It had drawn a distinction between the past and the future: for the past, it had sought to validate past acts of Governments which might have been invalid because of the existence of native title, in particular acts which had taken place after 1975, when the Racial Discrimination Act had been passed to implement of Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. Tragic as the past dispossession of Australia's indigenous people had been, in the Government's view it was not possible to undo those events. Rather, the question of their validity had been put aside, albeit with compensation payable for the effect of that validation on any native title rights. At the same time, the Native

Title Act had significantly restricted the future extinguishment of native title. The so-called "freehold test" had been introduced, freehold being the highest form of title to land under Australian law, and to a large extent the Native Title Act had provided that native title-holders should be accorded the same rights as freeholders.

6. The Act had created a special "right to negotiate", referred to during the debate as a special measure, although some regarded it as a provision of substantive equality for native title-holders. That was a procedure which was not available to other landholders in Australia and had to do with mining or compulsory acquisition of native title land. It had provided for notification of native title-holders and others, good-faith negotiation, a determination by an independent specialist body, the National Native Title Tribunal, and a limited overriding power for ministers. The right to negotiate had been open not only to people who had a determined claim to native title, but also to credible claimants, as a response to the problem that, since recognition of native title had come very late, it had been unclear where native title had existed and who had held it. The Act had introduced a process for obtaining a determination of native title from a special body, the National Native Title Tribunal, and the Federal Court, placing emphasis on mediation in resolving native title disputes. It had also established Aboriginal and Torres Strait Islander representative bodies to assist persons in making their claims to native title; those bodies were funded. Finally, the Act had set up a Land Fund, which would grow to a guaranteed capital base of 1.3 billion Australian dollars, to enable indigenous people who had been dispossessed and whose native title rights had been extinguished to purchase land.

7. On the basis of the Mabo decision and the Native Title Act, it had been estimated that about 39 per cent of Australia - i.e. vacant Crown land or land in respect of which there had been no other significant interests - could be claimed under native title, the assumption being that native title might be equivalent in such cases to ownership of the land. But it had also been assumed that in about 60 per cent of Australia, native title could not be obtained or claimed, because it had been extinguished by past acts of government over the 200 years of colonization.

8. The Wik decision, handed down by the High Court in 1996, concerned pastoral leases, which were a type of grant made by Governments to third parties allowing them to carry on pasturing and, in some cases, agricultural and other primary-production activities. In that decision, the High Court had found that the grant of a pastoral lease in the past had not necessarily extinguished native title rights to the land concerned. Instead, native title-holders and pastoral lessees could coexist on pastoral lease land. That decision had raised a number of issues. Firstly, pastoral leases concerned about 40 per cent of Australian land. Therefore, added to the other 39 per cent, native title claims could be made to about 79 per cent of Australia. Secondly, on pastoral lease land, it was clear that native title might not amount to full ownership of that land, because the native title owners shared the land with the pastoral lessees. There were two coexisting rights, neither of which amounted to full ownership. Thirdly, although the decision had established basic principles, it had not dealt in detail with the relationship between the native title-holders and the pastoral lessees on

pastoral lease land, which had remained unclear. Those issues had had to be addressed, as had a range of other questions that had arisen over the several years during which the Native Title Act had been in force.

9. The Native Title Amendment Bill had consequently been proposed by the Government to deal with issues raised by the Wik decision and in connection with the implementation of the Native Title Act. The passage of the Native Title Amendment Act had been controversial. There had been extensive consultation with stakeholders, and in the course of the parliamentary debate the Government had accepted many changes, some of which had been beneficial to indigenous interests. During the drafting of the Native Title Amendment Act, Australia had been alive to its obligations under the Convention.

10. The Native Title Amendment Act adopted in July 1998 had its own validation regime. Prior to the Wik decision, many State, Territory and, to some extent, Commonwealth Governments had assumed that native title to pastoral lease land had not existed. The Commonwealth Government had regarded that assumption as legitimate, because it was based on statements by the High Court, the Federal Court and the National Native Title Tribunal, and on the Native Title Act itself, debate on the legislation and other sources. Pursuant to the Wik decision, those statements had proved to be false, but the Government's position had been that the remedy had not been to invalidate grants made to persons on the basis of such a false assumption or to try to undo past events, but to validate a limited range of acts which had occurred in the period between the entry into force of the Native Title Act and the Wik decision, to offer compensation to native title-holders if their rights had been affected by that validation, to provide a measure of notification and to allow for some agreements to be reached on compensation. The validation regime under the Native Title Amendment Act was very limited, much more so than in the Native Title Act itself, essentially dealing as it did with grants of mining leases for pastoral lease land, and it was unlikely that it would extinguish any native title rights. In the Government's view, the validation regime had a legitimate object, was not arbitrary and had minimal impact on native title rights.

11. The second point in the Native Title Amendment Act worth noting was the confirmation of the extinguishment regime. The Government's policy had been to bring greater certainty to those areas in which native title had been extinguished in the past and those in which native title could continue to exist and could be claimed. The implementation of that policy would avoid costly, divisive litigation which on the basis of common law principles would not deliver benefits to native title-holders. The determinations made as to which areas and types of grants should be confirmed to extinguished native title had been made on the basis of the Wik and Mabo decisions.

12. The Commonwealth Government had rejected many proposals from States and Territories to confirm extinguishment in other areas. In particular, it had rejected proposals that it should confirm the wholesale extinguishment of native title on pastoral lease land, arguing that it would be contrary to the Wik decision and to its obligations under the Convention and the Racial Discrimination Act. The confirmation regime implemented in the Native Title Amendment Act meant that 79 per cent of Australia could be claimed by native

title-holders. If in the future it became clear that inappropriate grants or actions had been included in the confirmation regime, the Act allowed them to be removed from the regime.

13. The Commonwealth Government had itself proposed amendments to the Native Title Act incorporating parliamentary opposition and indigenous concerns about some aspects originally included in the confirmation regime: the position of national parks and Crown-to-Crown grants, for instance, was left to common law. Further, the amended Native Title Act included provisions which allowed native title claims to be made to land where there had been extinguishment once the extinguishing act had disappeared or been done away with, for example in the case of a road or a school that was no longer needed. Similarly, section 47 (b) of the Native Title Amendment Act allowed native title to be claimed where freehold or leasehold grants had been made which might have extinguished native title, but where those grants no longer existed. That position was much more beneficial to native title-holders than the general common law.

14. Lastly, the Government had retained the Land Fund, which enabled indigenous people to purchase land to which they had a special attachment but where there had been extinguishment of native title.

15. The Native Title Amendment Act recognized that native title issues should be resolved not by adversarial litigation but by agreements, and contained many provisions for facilitating agreements between native title-holders and farmers and pastoralists, miners and Governments.

16. In response to issues left unresolved by the Wik decision, the Native Title Amendment Act further provided basic rules on the relationship between native title-holders and pastoral lessees on pastoral lease land. In so doing, the Government sought to strike a balance between the two sets of rights. Its policy was that henceforth the agreement provisions in the Native Title Amendment Act should be used by pastoral lessees and native title-holders to establish the basis for their coexisting rights.

17. When the Act had been passed, the assumption had been that native title would exist chiefly on vacant Crown land where native title rights would amount to full ownership, and the right to negotiate had been developed in that context. The Government believed that the full right to negotiate was not necessarily appropriate where native title was only a coexisting right. It had been suggested by some that the Act allowed for the full removal of all native title rights with regard to mining and compulsory acquisition on pastoral lease land. That was not so: although the Act had been passed in 1998, the full right to negotiate continued in many cases to exist for pastoral lease land. But the Act allowed States and Territories to introduce alternative negotiation regimes, in particular for pastoral lease land, which must meet certain criteria. As originally proposed by the Government, the Bill had stipulated that States and Territories should be able to introduce regimes which gave native title-holders on pastoral lease land the same rights as pastoral lessees. However, the Government had eventually changed its position to allow for the unique features of native title and the fact that the interests and rights of native title-holders were not the same as those of pastoral lessees. Hence, section 43 of the amended Act contained a checklist

of criteria that States and Territories must meet to replace the right to negotiate on pastoral lease land with their own regime. Those requirements included notification of native title holders, representative bodies and claimants, an opportunity to contest the mining or compulsory acquisition, the possibility of consultation, in particular to minimize the effect of the mine on native title rights, and a decision on the mine by an independent person. In addition, alternative regimes must be approved by the Commonwealth Minister and could be rejected by the Commonwealth Parliament.

18. The Native Title Act, as amended by the Native Title Amendment Act, continued to protect native title rights and respected the Mabo and Wik decisions. It did not seek to undo the past or remedy the historic dispossession of indigenous people in Australia, but tried to provide some certainty about where there had been extinguishment and remedies for the future which would enable native title holders to claim land, and, with the help of the Land Fund, to purchase land, notwithstanding extinguishment. As amended, the Act significantly limited any future extinguishment of native title and sought to incorporate native title rights into Australian law. It maintained much of the right to negotiate. It allowed claims to be made over 79 per cent of Australia, and a significant part of Australia had in fact been claimed in more than 880 claims currently being processed.

19. The Committee had raised the question of proposed changes to land rights law in Australia, which he took to mean the Northern Territory Aboriginal Land Rights Act. A report commissioned on that legislation had suggested making substantial changes to the Act. The Government would carefully consider the recommendations.

20. Concerning the Aboriginal and Torres Strait Islander Social Justice Commissioner, he observed that the functions of that position had not changed, but that, following a review of the work of the Human Rights and Equal Opportunity Commission, the Government had put forward legislation to restructure it, conferring the current functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner on the Commission as a whole. Other specialist positions would be dealt with in the same way. The Government's decision to abolish "portfolio-specific commissioners and confer their duties on more generalist deputy presidents was aimed at addressing the perception that the Commission was too focused on protecting those sections of the community for whom a specific commissioner existed, often to the detriment of other disadvantaged sections of the community. One of the deputy presidents would have responsibility for racial discrimination and social justice issues. The Government recognized the practical importance and symbolic significance of monitoring, educational and reporting functions in relation to the human rights of indigenous Australians and remained committed to ensuring that they could be effectively performed by the Commission.

21. The CHAIRMAN said that, in the light of the many communications received from non-governmental organizations (NGOs) and other groups, as well as from individuals, he was convinced that the Committee had been right to adopt its decision 1 (53).

22. Ms. McDougall (Country Rapporteur) welcomed the detailed report of Australia and expressed her appreciation for the assistance and detailed submissions she had received from the Australian authorities. A number of NGO submissions had likewise been useful.

23. Australia's two largest groups of indigenous peoples, the Aboriginals and Torres Strait Islanders, together accounted for some two per cent of the country's total population of 18.3 million. The Aboriginals had lived in Australia for at least 50,000 years, while the Torres Strait Islanders had lived in the islands for around 10,000 years. Numbering between 300,000 and 1,000,000 at the time of European settlement in 1788, the Aboriginal population had dropped dramatically until the twentieth century as a result of the disease, displacement, repression, brutal treatment and socio-cultural disruption caused by the settlers. As many as 100,000 Aboriginal children - the "lost generation" - had been separated from their parents in order to be brought up with "civilized" values. Until 1967, the First Peoples of Australia had been denied citizenship and voting rights and had not even been counted in official censuses. Since then, however, serious steps had been taken by the Government to address the social, health and economic risks to the Aboriginal peoples, including, for example, the establishment of special agencies such as the Office of Aboriginal Affairs, the Aboriginal and Torres Strait Islander Commission and the Human Rights and Equal Opportunity Commission.

24. Despite those efforts, which the Committee welcomed, indigenous persons continued to fare dramatically worse than the non-indigenous population in the areas of health, education, housing, criminal justice, employment and job training, as the Government itself had acknowledged in its previous report.

25. Australia's land practices represented the worst example of racially motivated impairment of native rights. The doctrine of terra nullius had made it possible for settlers to obtain full legal recognition of their property rights, in complete disregard for Aboriginal interests and the cultural value of their traditional land distribution system. The nineteenth-century policy of "reserving" some land for indigenous people could not make up for the massive displacement of the continent's inhabitants from their homeland.

26. In 1992, in a landmark case, Mabo v. Queensland, the High Court had ruled that the terra nullius doctrine was unconstitutional and violated the Racial Discrimination Act of 1975, which had been enacted in part to fulfil Australia's obligations under the Convention. To undervalue indigenous law and custom while recognizing British common law property rights had been ruled unlawfully discriminatory. The Government had constantly justified its actions by invoking the standard of common law. Under that standard, however, native title was a vulnerable property right and other land titles were better protected against interference or forced alienation. Common law was therefore racially discriminatory. The response of the Australian Government to the Mabo decision had been to pass the Native Title Act 1993, which had established a system to recognize native title claims through the National Native Title Tribunal, a measure that the Committee had welcomed when it had considered Australia's previous report.

27. The original Act had allowed "validation" of prior land dealings that might have been invalid under the Racial Discrimination Act. Because such validation had been deemed racially discriminatory, the Act had provided two key protections for native title with respect to future land dealings: the "freehold standard", which required native title to be treated in the same way as freehold title, and a "right to negotiate" over certain land use in the future - notably mining. It was the inclusion of those protections for the future that had enabled indigenous groups to support the Act despite its discriminatory provisions relating to the past. In 1993, the Committee had accepted that the Act, described by Australia as a "special measure" under articles 1, 4 and 22, was compatible with the Convention.

28. Native title-holders had won another apparent victory in 1996, with a ruling in the Wik Peoples v. Queensland case that a government grant of pastoral lease did not necessarily extinguish native title over the area in question. However, the definition of valid extinguishment under the Act had remained unclear and, under pressure from, in particular, mining interests, Parliament had passed the Native Title Amendment Act 1998, a piece of legislation that had aroused strong criticism on the grounds that most of its provisions focused on the extinguishment and impairment of native title.

29. Notwithstanding the Government's arguments justifying the amendments, notably on grounds of its interpretation of the Wik case, she had concluded that the central goals and compromises underpinning the original Act - the protection and recognition of native title and the establishment of mechanisms affirming the Mabo decision - bore little relation to the amended Act, which appeared in many ways to wind back the protections offered by the Mabo and Wik decisions. The Wik decision appeared to hold that a pastoral lease did not necessarily extinguish native title; that native title could coexist with pastoral leases; and that, in a conflict between a pastoral lease and native title, the pastoral lease would prevail to the extent of the inconsistency. She asked whether that was a fair reading of the High Court decision. She also wondered why, given the limited nature of pastoral leases, the Wik decision should cause so much uncertainty.

30. A central question was whether the amended Act had unsettled the compromise between the rights of native title-holders and non-native title-holders reached in the original Act, giving greater weight to non-native title even with respect to future land uses. The four main criticisms of the amended Act related to the validation of otherwise invalid past acts; the "confirmation of extinguishment"; the primary production upgrade; and restriction of the right to negotiate. In addition, the amended Act set the registration test at a high threshold, which would probably make it more difficult for claimants to assert native title rights, including the right to negotiate future land use.

31. The amended Act validated certain encroachments on native title that had occurred between the date of the original Act and the Wik decision, despite the fact that many of those acts might have been invalid under the original Act and under Wik. Was it correct that many of the actions thus validated could have been invalid under Wik? Was it not fair to say that Wik required a case-by-case analysis rather than the blanket validation approach established in the amended Act, since, under Wik, non-native title prevailed over native

title only to the extent of the inconsistency? Had the Social Justice Commissioner not issued warnings that, if non-native title-holders acquired their rights after Mabo and the original Act without investigating the possibility of coexisting native title, they would do so at their own risk? Did the blanket retrospective validation not reward those who had ignored such warnings? Were the provisions not discriminatory in validating acts and providing for extinguishment only in relation to native title and not in relation to other forms of title - and with no countervailing benefit to be obtained on the basis of which the amendments could be considered "special measures" under the Convention?

32. The amended Act also contained provisions confirming and listing in a Schedule certain land holdings as "previous exclusive possession acts", which were deemed to extinguish all native title claims. Despite the Government's assertion that the aim of those provisions was to reflect common law but make lengthy case-by-case determination unnecessary, she believed that they in fact encroached on common law native title protections because, first, they deemed that certain tenures extinguished native title where at common law they would not; and second, such confirmed tenures extinguished native title for ever, regardless of whether the non-native tenure continued. That denial of any possibility of reversion of native title interests following the end of an exclusive possession lease appeared to go beyond the High Court's intentions in Wik: native title-holders could claim compensation but not ownership. Was reversion in fact possible, as the Government representative had appeared to indicate? The report stated that just terms compensation was assured where there had been no prior common law extinguishment and it gave an overall impression of minimal impact - only 7.7 per cent of Australia - but it appeared in fact to be a sweeping divestment of native rights.

33. Did the delegation agree with her assessment that the common law recognition of native title was itself discriminatory and therefore did not, on its own, comply with the Government's obligations under the Convention? Was it correct that Wik required at least a case-by-case analysis of what tenures were inconsistent with native title and to what degree, and that a clear legislative intention was required to extinguish native title? Did Wik not require the opposite of the blanket extinguishment of native title established under Schedule 4? She wondered how the Government saw the recent Miriwung and Gajerrong case, in which a federal court in Western Australia had found that many titles listed in the Schedule to the amended Act did not extinguish native title at common law. If that decision was correct, would it not mean that the amendments had given rise to even greater discrimination and divestment than was the case under common law? What had been the nature of the consultation with indigenous peoples over which tenures were to be included in the Schedule? Was it correct that the effect of the provisions was solely to divest native title-holders while having no similar impact on non-native title-holders and how was that consistent with the Government's obligations under the Convention?

34. The amended Act allowed pastoral leaseholders to upgrade the range of primary production activities permitted on their leaseholds, regardless of the possible effect of such activities on coexisting native title interests and without the consent of a native title-holder. Since primary production activities involved far more intensive land use (logging or quarrying, for

example) than pastoral activities, and thus might transform the nature of the lease and reduce the possible extent of coexistence with native title, those provisions appeared to discriminate against native title-holders by granting unwarranted preference to the interests of non-native title-holders. Holders of non-native title property interests coexisting with pastoral leases would not be affected in the same way, since, as she understood it, primary production upgrades were not authorized on the land of non-native title-holders without their consent. According to the Social Justice Commissioner, the provisions seriously eroded the benchmark of equality central to the original Act; the expansion of pastoralists' rights and corresponding restriction of native title-holders' rights, together with the confirmation and validation provisions, would constitute the greatest single and explicit impairment of native title in Australian history. She asked what the Government's response was to that comment. She also inquired whether the primary production upgrade provisions did not eliminate the freehold standard guaranteed for the future under the original Act and return indigenous title-holders to the position of inequality.

35. The original Act had granted native title-holders the right to negotiate "permissible future acts" relating mainly to mining exploration and production and to the compulsory acquisition of the land by the Government for the benefit of a third party - a major compromise between native and non-native title-holders' interests. Far from merely streamlining or re-working the right to negotiate provisions, as claimed by the Government, the amended Act fundamentally altered the right by rescinding altogether the right to negotiate in certain circumstances, most importantly in relation to land exploration and mining activities and by allowing States and Territories to replace the right to negotiate with a lesser right of consultation and objection that did not require the Government to act in good faith; nor did it make the validity of the grant being sought subject to proper consultation. The right to consult and object was clearly a lesser procedural right.

36. The indigenous communities' consent had been critical to the legitimacy of the original Act. The Government report noted that, in developing its response to Wik, too, it had undertaken extensive consultation with all interest groups (para. 31). The Committee would welcome additional information concerning that consultation process in the light of conflicting information suggesting that indigenous representatives had been marginalized during the legislative process and had totally rejected the final legislation. A lack of effective participation by indigenous people in that process could be a cause for concern with respect to Australia's compliance with its obligations under the Convention. In its General Recommendation XXIII, on indigenous peoples, the Committee had stressed that no decisions directly relating to their rights and interests should be taken without their informed consent.

37. What steps had the Government taken to ensure the effective participation of indigenous peoples and had their "informal consent" been obtained? How had the Government determined that their interests were adequately incorporated given that the Social Justice Commissioner, the Aboriginal and Torres Strait Islands Commission and the National Indigenous Working Group had opposed the amended legislation?

38. One of the omissions in the report was the failure to provide an explicit analysis of the compatibility of the amended Act with Australia's obligations under the Convention, although it did state that the new Act must be construed subject to the provisions of the 1975 Racial Discrimination Act (RDA). Australia must be commended for incorporating the provisions of the Convention into domestic legislation through the RDA. However, the principle of parliamentary sovereignty made the provisions of the RDA inferior to subsequent conflicting legislation of the Federal Parliament, including the original and the amended Native Title Act, and State legislation authorized by the amended Act was also immune from challenge based on the RDA. She based that view on the High Court's decision in the case of Western Australia v. Commonwealth that "the general provisions of the Racial Discrimination Act must yield to the specific provisions of the Native Title Act in order to allow those provisions a scope for operation", a ruling reached in spite of section 7 of the Act intended to ensure that the RDA would be controlling in the interpretation of the Native Title Act. An amendment that would have effectively given the provisions of the Racial Discrimination Act precedence over those of the Native Title Act had not been adopted, meaning that where the Act authorized activities in conflict with the RDA, those activities would be valid under Australian law, even though they breached Australia's international obligations.

39. What was the legal effect of the High Court's decision in the Western Australia v. Commonwealth case? Could the delegation comment on the statement in the Australian Government's submission that nothing in the Native Title Act as amended affected the operation of the RDA, and on her understanding that section 7 of the amended Act might not provide protection against discrimination where a provision of the amended Act or legislation authorized by it discriminated against native title-holders? How did the Government define "substantive equality" as opposed to "formal equality" and did the Government consider that the Convention did not require substantive equality? What was the Government's definition of a "special measure" as provided for under articles 1.4 and 2.2 of the Convention and how would that apply to the amended Act? One stated reason for amending the Native Title Act had been to create legal certainty after the Wik decision; could that not have been done by favouring native title over non-native title? Why was it that in every case the discrimination was against Aboriginal claims and in favour of other interests?

40. Regarding the proposed replacement of the Aboriginal and Torres Strait Islander Social Justice Commissioner and the Race Discrimination Commissioner by a deputy president of the Human Rights and Equal Opportunity Commission, would the latter's budget and powers be equivalent to those currently allocated to the two separate posts? What justification was there for any reduction in authority and resources in so important an area? She noted that a new Social Justice Commissioner had just been appointed but the Acting Social Justice Commissioner, in her submission to the Committee, had observed that "given the continued disproportionate rate of indigenous incarceration, the disproportionate numbers of Aboriginal and Torres Strait Islander people who die in police and prison custody, [and] the chronic and distinct disadvantage of Indigenous Australians as demonstrated by all social indicators, it may be considered that the continued existence of an appropriately qualified, specialist position to report on the exercise and

enjoyment of human rights by Aboriginal and Torres Strait Islander people falls within the characterization of a special measure required to comply with Australia's obligations under [the Convention]". A comment on that observation in the light of the legislation currently being passed would be welcome.

41. Mr. Sherifis took the Chair.

42. Mr. DIACONU said that the difficulties adduced in paragraphs 26 to 29 of the report as justification for amending the Native Title Act had been mainly technical, and none were the fault of the indigenous people. The purpose of the amended Act was in fact not to remedy the technical difficulties but to ensure certainty and the enforceability of acts potentially rendered invalid because of the existence of native title; in other words, it protected the claims of other groups to maintain the validity of their title to property when it ran counter to native title. The criteria for the registration of titles were exorbitant; indigenous persons had to show that they could establish property rights and prove that those rights had not meanwhile been infringed by other means. Negative proof was very difficult to establish in law.

43. Regarding confirmation of title (paras. 37 to 40), any previous change in title could lead to the extinguishment of a claim, and that included use at any time under residential, pastoral, commercial or community leases. Was the 21 per cent of land excluded by the confirmation regime the area in which indigenous populations actually lived and had their cultural links? If the 79 per cent potentially claimable was desert area, the offer was not a just one. The figures in paragraph 59 (ii) on coexisting native title on pastoral leases - over 40 per cent of Australia's landmass - further limited indigenous people's claims and their right to land use. He would like clarification of the geographical issues involved.

44. Regarding agreements on use of native title land, all agreements were permitted, even those which led to the extinguishment of native title. It was too easy to conclude such agreements and thus lose native title. Was it not possible to protect indigenous persons from concluding such agreements? In Europe, for instance, the Sami held property under community title and therefore one individual could not sell property but required the agreement of the entire community, which effectively protected the community's land tenure.

45. Regarding competing claims between indigenous and non-indigenous persons, the Act increased the inequalities between the different groups. To what extent were the traditional rights of indigenous people affected by the provisions of the Act? That was the Committee's starting point: the special relationship between the Aboriginals, their culture and way of life, and the land. Native property rights should not simply be given the same protection as any other property rights but should be subject to special protection measures; anything else was tantamount to not protecting them. What did paragraph 55 mean by stating that States and Territories could replace the right to negotiate with "their own regimes", bearing in mind that the right to negotiate afforded protection not provided by procedural rights? A new balance needed to be struck between all rights and interests in Australia. Perhaps renewed negotiations with the Aboriginal community would be necessary

in order to review the Act and its procedures for implementation so as to find a balance which would also protect the rights of the Aboriginal. The Aboriginal people only asked that all laws and their provisions should be neither discriminatory in intention nor in fact against the Aboriginal population.

46. Mr. BANTON said that he would confine his comments to consideration of whether anything in the amendments to the Native Title Act constituted a violation of the State party's obligations under articles 2 and 5 of the Convention, proceeding from the premise that Aboriginal land rights derived from the pre-colonial period and were recognized at common law and could validly be extinguished. Those rights were now recognized in international norms. Moreover, a Canadian precedent suggested that there might be a common law obligation upon a Government to act in good faith and in the best interests of its indigenous peoples. Aboriginal Australians might have a right to effective participation in decision-making about their rights, in accordance with article 2.1 (c) and (e) of the Convention and the Committee's General Recommendations XXI and XXIII. The Aboriginal and Torres Strait Islander Commission and others had maintained that the national interest entailed the protection of the indigenous heritage; if that claim was not accepted he would like to know the reasons for rejecting it. The question of possible violation was immediate; in August 1998 the Queensland Government had extinguished in perpetuity possible native title over 12 per cent of the State's territory.

47. On the right to negotiate, some of the changes required more justification, such as the removal of the right with respect to the intertidal zone, the granting of mining rights by governments and the provisions for expediting government approval for changes in land use. Some future acts concerning primary production, management of waters and airspace, renewal and extensions, reservations and leases and facilities for services to the public, would be valid without any right to negotiate. The restriction of claims to those already on the register was a significant restriction of the right to negotiate. Those were serious diminutions of a common law right protected by international law, and they failed to recognize substantive rights. Some of the changes might be improvements but much would depend on the interpretation of statutes and rules; the major change was that the indigenous peoples no longer trusted in the Government's good faith.

48. Provisions for the validation of intermediate-period acts appeared to be formally discriminatory in that they bore only upon native title and not upon other cases of potential invalidity. The powers conferred upon the governments by the amended Act were greater than those needed to implement the Wik decision, embodied new policies and prevented any revival of native title on the expiry of a non-exclusive tenure. He had heard that in New South Wales time limits were being imposed for the registration of claims, which made it difficult for claimants to have the necessary investigations carried out to obtain evidence for native title. The "confirmation of extinguishment" provisions failed to accord native title-holders equality before the law since they bore only upon indigenous persons and affected titles that could well have been left undisturbed, such as those listed in the document submitted by the Australians for Native Title and Reconciliation (ANTAR) movement.

49. The definition of primary production purposes was very broad and apparently included no meaningful requirements for consultation or negotiation with native title-holders. He would welcome comments on the ANTAR claims (p. 25, para. 3 of the ANTAR submission), that primary production provisions discriminated against native title-holders in terms of prior consent for the granting of grazing or irrigation rights.

50. Apparently 60 per cent of the aboriginal population would be unable to register any claims. The Aboriginals' ancestral land rights had already been extinguished. In those circumstances, the compatibility of the amendments with Australia's obligations under the Convention was questionable.

51. Mr. YUTZIS said that the volume of documentation available to the Committee showed the importance of the issue, which should be considered not only from the legal standpoint but also in the context of the suffering endured by the Aboriginal people in the past and their continued vulnerability today, as evidenced by the number of Aboriginals in prisons and the difficulties which they, like other vulnerable groups the world over, had in asserting their rights and proving their claims. Paragraph 29 of the report acknowledged that Aboriginal representative bodies were unable to deal with subjects affecting them, on account of their lack of explicit powers and functions.

52. Regarding the issue of coexisting native title, the Australian representative had referred to coexisting interests rather than coexisting rights; which prevailed, rights or interests? Paragraph 57 mentioned indigenous groups' concern that pastoral lessees might attempt to prevent native title claimants from continuing access to the lessee's land for conducting traditional activities, and stated that, conversely, some pastoralists were concerned that native title claimants with no prior access would try to gain access despite having a weak claim. Without prejudging the issue, he said that the paragraph showed an imbalance between the situation of pastoral lessees and that of native title claimants - a recurring problem throughout the report. There was too much emphasis on requests for proof of title for registration, with registration requirements weighted against native title. He drew the State party's attention to paragraph 5 of the Committee's General Recommendation on the rights of indigenous peoples and requested details of the measures being taken to comply with that obligation.

53. Turning to the role of the Social Justice Commissioner, he noted that another structure was being created to deal with the same issues; had the indigenous institutions been consulted, why was the State apparently making a unilateral decision, and what had been the reasons for such a decision?

54. Mr. LECHUGA HEVIA said that the amendment to the existing legislation governing the indigenous population of Australia had major implications for their way of life, livelihood and traditional land rights. The Government's claim that the Aboriginal population would benefit from the Native Title Amendment Act 1998 was rejected by the indigenous people themselves. He asked the delegation to comment in general terms on NGO allegations that the Act, as amended, had undermined certain advantages acquired by the Aboriginal population in recent years and upset the balance between indigenous and non-indigenous interests to the benefit of the latter. To what extent had

indigenous access to traditional land forming part of their ancestral heritage been curtailed? By all accounts, the Aboriginal population had not been properly consulted on the amendments to the Native Title Act, which had allegedly been weighted in favour of non-native title-holders. The Committee had received communications from two Members of Parliament representing the opposition Labour Party who considered that the new measures were racially discriminatory.

55. Mr. VALENCIA RODRÍGUEZ said it was understandable that the Native Title Amendment Act should arouse strong emotions in Australia's indigenous population, which had now been rendered more vulnerable. He associated himself with the comments of the Country Rapporteur and other members of the Committee.

56. Ms. ZOU Deci said that the initial impression she had received from NGO material was that the Australian Government was pursuing a retrogressive policy. The indigenous population was being deprived through legislation of rights it had previously enjoyed. She gathered from the media that the "One Nation" political party openly advocated racial discrimination and xenophobia. Such conduct was a flagrant breach of the Convention and called for strong action by the Government against such manifestations of racism and xenophobia and in defence of its victims.

57. Ms. SADIO ALI said that the Committee linked the obligation of non-discriminatory respect for indigenous culture to the question of control over land. She appealed to the Australian authorities to negotiate an amicable settlement to the issue.

58. Mr. GOLEDZINOWSKI (Australia) said that the Special Rapporteur of the Sub-Commission, addressing the United Nations General Assembly in November 1998, had drawn attention to the setback experienced by the "One Nation" party, whose leader had lost her seat in the Australian Federal Parliament in the October 1998 elections. He had welcomed the efforts by the population of Queensland and the Federal Government to reduce the influence of the party, which opposed the official policy of multiculturalism and ethnic and cultural diversity. Immediately after the elections, the Australian Prime Minister had undertaken to promote an authentic reconciliation with the Aboriginal population in the context of the centenary celebrations of the Australian Federation. A new ministerial portfolio with responsibility for reconciliation had been created to that effect. The Government had also established a National Multicultural Advisory Council and launched a "Living in Harmony" programme designed to support community awareness of racial, cultural, social and religious diversity.

59. Mr. ORR (Australia) said that he would address the Committee's general concerns before replying to specific questions at the next meeting.

60. Articles 2 and 5 of the Convention were interpreted in Australia as placing a twofold obligation on States parties: to prohibit racial discrimination and guarantee equality, and to take temporary affirmative action when circumstances so warranted in order to ensure racial equality. However, judgements concerning analogous circumstances and the appropriateness of different treatment could only be made on a case-by-case basis.

International law, as understood by Australia, recognized that fact by according States a margin of appreciation in their implementation of principles of non-discrimination. However, the margin of appreciation in cases of racial discrimination was narrow. In Australia's view, the recognition of common-law native title rights more than 200 years after the settlement of the country was a field in which some margin of appreciation, especially in regard to historical actions, was permissible. He would address the issue as to whether Australia could undo discriminatory actions that had occurred during the period between settlement and the 1992 Mabo decision at the next meeting.

61. Australia was aware of the importance, from the point of view of its obligations under the Convention, of ensuring that decisions regarding treatment, for example under the Native Title Amendment Act, were not arbitrary but had an objectively justifiable aim and used proportionate means. The Convention had been incorporated into domestic legislation through the 1975 Racial Discrimination Act. Australia's interpretation of that Act was informed by but not dependent on international law. It placed more emphasis on formal equality than substantive equality, the only exception being cases where special measures were appropriate. As a result, there was some divergence between the two approaches in the Australian judicial system.

62. The fact that the Native Title Amendment Act dealt primarily with native title rights, i.e. land and water rights arising from the traditional laws of Australia's indigenous people as recognized by common law, and not with the rights of others with land and water interests under common law or statute law, did not, in Australia's view, make the Act discriminatory. Rather, it was necessary to examine the overall substantive impact of the original and amended Native Title Acts and other relevant legislation and the balance that had been struck between various rights and interests. It should be recognized that past acts, however discriminatory, could not be undone, although their impact could be mitigated by present and future policies.

63. The Government had attempted, following the Wik decision, to obtain some form of consensus on reconsideration of the Native Title Act. It had consulted stakeholders, including indigenous representatives, published its proposals, sought and considered comments at a number of stages, and allowed extensive parliamentary debate. It had accepted a large number of amendments to the bill, many taking into account comments by the opposition, minor parties and indigenous representatives. The final version had not met the concerns of the indigenous representatives but it had also failed to meet the concerns of other stakeholders such as pastoralists, miners and some States and Territories.

64. He agreed with the Country Rapporteur's summary of the Wik decision. Pastoral leases were a traditional form of grant by the Government. While it had previously been assumed that such grants extinguished native title rights, the High Court had ruled that they did not necessarily extinguish all such rights. The Government's assumption that pastoral leases did not extinguish native title was actually more generous than the Wik decision. The Government also took the position that native title could coexist with pastoral leases. He agreed with the Country Rapporteur that, where there was a conflict between the rights of pastoralists and those of native title-holders, the former

prevailed but only to the extent of the inconsistency. It was difficult to establish, however, what the implications were for particular pastoral leases and native title-holders. The rights of a pastoral lessee were not always clearly identifiable from the lease. They varied considerably from one part of the country to another because responsibility for land law lay with the States and Territories rather than with the Commonwealth Government. At all events, although the High Court and common-law position was that the rights of pastoral lessees prevailed, that was not necessarily the position adopted in the Native Title Act itself. It had been argued that the Act had reversed the previous position and accorded priority to native title-holders. In the Government's view, the Wik decision had created considerable confusion regarding the rights of pastoral lessees and native title-holders where the two coexisted. One of the purposes of the Native Title Amendment Act had been to clarify the situation.

The meeting rose at 6 p.m.



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Fifty-fourth session

SUMMARY RECORD OF THE 1324th MEETING

Held at the Palais des Nations, Geneva,
on Monday, 15 March 1999, at 10 a.m.

Chairman: Mr. ABOUL-NASR

later: Mr. DIACONU

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PREVENTION OF RACIAL DISCRIMINATION, INCLUDING EARLY WARNING MEASURES AND
URGENT ACTION PROCEDURES (continued)

Australia (continued)

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The meeting was called to order at 10.15 a.m.

PREVENTION OF RACIAL DISCRIMINATION, INCLUDING EARLY WARNING MEASURES AND
URGENT ACTION PROCEDURES (agenda item 3) (continued)

Australia (CERD/C/347) (continued)

1. At the invitation of the Chairman, the members of the delegation of Australia resumed their places at the Committee table.

2. Mr. ORE (Australia) replied first to the questions that had been put to the Australian delegation by the Country Rapporteur, Ms. McDougall. He said that there was no discrepancy between her views and those of Australia on many important points. The Mabo decision, handed down by the High Court in 1992, had effectively recognized for the first time the land rights of indigenous peoples in Australia and had been confirmed by the Native Title Act, enacted by the Australian Government and Parliament with the aim of protecting those rights. That Act had subsequently been amended by the Native Title Amendment Act 1998. Regarding the effects of the Wik decision of 1996, i.e., that a pastoral lease did not necessarily extinguish the effects of a native title recognized in the Native Title Act and could coexist with such a title, he recalled the rule according to which, when there was an inconsistency between native title rights and the rights of a pastoral leaseholder, the rights of the latter prevailed only to the extent of the inconsistency. The Wik decision and other subsequent decisions had been adopted in order to prevent the partial extinguishment of native title from becoming permanent and to remedy the fact that native title rights that were still in force might be supplanted by the rights of pastoralists.

3. Regarding the extent of the rights of pastoral leaseholders, the Australian Government considered that the Wik decision had created uncertainties by affirming that those rights did not necessarily extinguish native title and could coexist with it. Moreover, the rights of pastoralists were very poorly defined and varied, sometimes considerably. In some parts of the territory, they covered only pastoral activities, while in others they authorized a vast range of sometimes substantial activities in intensive agriculture, forestry and fish farming. The rights of native title-holders were no better defined in the decision, since it did not give any details regarding native title-holders or the substance of the rights in question, so that the relationship between the two sets of rights - native title rights and the rights of pastoral leaseholders - was not specified. The Native Title Act had been enacted without giving consideration to the coexistence of the rights it protected with those arising from pastoral leases and it therefore contained no provision for resolving that problem. That was why it had happened that a decision contrary to the Wik decision had been handed down. The significant uncertainties raised by the Wik decision had provoked lively public and political debate in Australia.

4. In reply to Ms. McDougall's questions concerning the validation of acts that were invalid under the Native Title Act, he confirmed that many measures validated under the amended Act could have been considered invalid under the Wik decision. He explained that the Native Title Act had contained important measures for protecting native title as well as restrictions on possible

government decisions to issue mining grants, which were supposed to be subject to a negotiation procedure. Previously, it had been assumed that that type of grant concerned mainly Crown lands, which automatically came under the negotiation procedure, and that native title rights to lands granted to leasehold or freehold had been extinguished, including lands granted to pastoral leasehold. It had therefore been judged unnecessary to implement the negotiation procedure before issuing mining grants for pastoral lease lands. According to the Wik decision, there was no basis for that assumption, since native title rights to lands subject to such leases could exist and some grants that had not been through the negotiation process could be considered invalid.

5. The Country Rapporteur had asked why the Government had not conducted a case-by-case analysis of grants and whether the blanket validation provided for in the Native Title Amendment Act was incompatible with the decisions. He replied that there was nothing in the Wik decision that required an analysis of each decision and that the Government had considered it necessary to validate the measures that had been taken on the assumption that no native title to pastoral lease lands had existed prior to the Wik decision. As a result, grants made irregularly but in good faith by third parties were to be validated under the Native Title Amendment Act, while care was taken to alleviate as much as possible the effects of validation on native title. That was why the Government had made provision for a notification regime for mining grants likely to be called into question, which had been incorporated into the amended Act at the request of indigenous and Aboriginal groups. Compensation was paid to native title-holders whose rights had been affected by grants that had been revalidated after being declared invalid. In any case, the issuing of mining grants did not entail the extinguishment of native title, since the rights to granted land were restored to the holders as soon as mining activities were finished. Validation was therefore compatible with the Committee's General Recommendation XXIII (51) concerning indigenous peoples since it made provision for restitution and compensation.

6. The new validation regime was of much more limited scope than that of 1993, which had governed all land grants effected in Australia since 1798, because it related only to acts carried out during the 1993-1996 period and to land granted under pastoral leases.

7. Ms. McDougall had asked if it were not the case that the Government and the miners had acted recklessly in issuing or accepting grants during the period under consideration, without following the procedure relating to native title or heeding the Social Justice Commissioner's warnings. His reply was that the Government had acted in accordance with general legal opinion - particularly opinions or decisions of the High Court, the Federal Court, the National Native Title Tribunal and eminent members of parliament - as well as the preamble to and article 47 of the Native Title Act, under which native title rights had not been applicable to pastoral lease lands.

8. Ms. McDougall had considered that the validation regime was discriminatory because it concerned exclusively acts affecting native title without offering any countervailing benefits. He rejected any presumption of discrimination, because the Native Title Act itself, of which the validation regime was a part, dealt only with native title, which could not be considered

discrimination against native title. The fact that the validation regime concerned only acts carried out during the 1993-1996 period did not constitute discrimination either; nor did the fact that only grants carried out in good faith in ignorance of the law or due to the unspecific nature of the applicable legal provisions could be validated. The Government was therefore of the opinion that the Act continued to provide significant countervailing protections and benefits to native title-holders.

9. Ms. McDougall and other members of the Committee had expressed an interest in the confirmation regime. He could reply that the Australian Government's policy in fact aimed to specify which native title rights had been extinguished and which had not and could therefore be claimed, by establishing a system for ensuring the certainty, predictability and legitimacy of objectives, based on the Mabo and Wik decisions.

10. He confirmed that the provisions of the common law were discriminatory. That was why the Native Title Act aimed to prevent any new extinguishment of native title resulting from the grant of freeholds, through provisions that were much more effective than those of the common law. The Act was not focused on the past but rather aimed to set precise rules for the future and to alleviate certain effects of the common law. Article 47 of the Act allowed native title-holders to claim lands even in cases where their rights had been extinguished under the common law, and even when extinguishment had been confirmed by the confirmation regime. They could, moreover, claim rights to lands granted as freeholds in cases where the original titles no longer existed and obtain the restitution of such lands.

11. On the question of why the courts could not adopt a case-by-case approach, he said that, under such a system, the common law courts would have to consider some 60,000 leases covering 600 categories in hearings that would be not only lengthy and expensive but also adversarial and would cause deep divisions in the country's rural communities. Moreover, since indigenous claimants would generally lose cases by invoking the Wik and Mabo decisions, the Government preferred to refer to the Native Title Amendment Act, which, in accordance with the aforementioned decisions, confirmed the extinguishment of native title on only 21 per cent of Australian territory. Indigenous claims could therefore apply to the remaining 79 per cent of the territory on the basis of fair and rational rules. That avenue gave access to the Land Fund, which had been granted 1.3 billion dollars to enable indigenous people to buy back lands for which the extinguishment of their rights had been confirmed. The Government considered that the system of buying back land by agreement with grant-holders was preferable to litigation.

12. Regarding Ms. McDougall's question on the Miriuwung and Gajerrong case, he said that most of the lands concerned were pastoral lease lands. The Government considered that the ruling in that case was not in conformity with the Wik and Mabo decisions and was appealable.

13. Ms. McDougall and Mr. Banton had also asked whether the confirmation regime divested native title-holders of their rights. The Australian Government refuted that suggestion. The regime merely recognized that native title rights were extinguished under grants of pastoral leases and freeholds relating to 21 per cent of lands made over the past 200 years. The Australian

Government did not believe that its historical position was incompatible with the provisions of the Convention and the Committee's General Recommendation XXIII on the rights of indigenous peoples. It acknowledged a certain obligation under the Convention to facilitate the restitution of rights to indigenous people where possible and to prevent new extinguishments of their rights, except with the agreement of holders of such rights or by a non-discriminatory acquisition process (para. 45), in accordance with the provisions of the Native Title Act.

14. Regarding the primary production regime, he said that the system in place aimed to achieve a balance between the rights of native title-holders and the rights of pastoral leaseholders. The Native Title Act laid down basic rules on the activities that pastoral leaseholders were authorized to engage in and defined a compensation regime for native title-holders affected by such activities. It provided particularly that a leaseholder could neither carry out activities outside the primary sector nor upgrade his or her title to exclusive leasehold or freehold.

15. The Native Title Act recognized native title holders' right of access to lands and their right to negotiate substitution regimes as well as other benefits and protections. Given that neither the common law nor the Convention required native title-holders to be given precedence on pastoral lease lands, Australia believed that the Act established a balance between two sets of concomitant interests: the legitimate rights of pastoral leaseholders to engage in their activities and the protection of the important land ties of native title-holders. Since the Government would not be in a position to establish a complete set of rules laying down how the two groups should coexist on the lands concerned, it was urging them to conclude agreements in that regard, by enacting provisions aimed at making their task easier.

16. He explained, moreover, that the right to negotiate was protected by law, that it was of a special nature and that native title-holders were recognized as having that right. The Native Title Amendment Act 1998 had effectively rescinded the right in certain areas, but not those mentioned by Ms. McDougall. That did not mean that native title-holders no longer had rights but that, when those rights had been extinguished, procedures had to be put in place to address the interests of indigenous people. For example, while the amended Act had withdrawn the right to negotiate over exploration and mining activities on indigenous lands and over certain pastoral lease rights, special protections had been expressly established. An appeal for mediation in the event of litigation had been introduced and an independent person had been appointed to conduct hearings on such issues. Injured persons had been compensated and protected sites created. When the text of the 1998 Act was being negotiated, many proposals for amendment had been tabled by representatives of indigenous people and a compromise solution had been found, taking into account the needs expressed by native title-holders. The Government had done much to ensure that rights to negotiate would be respected and that adequate protections and standards for compensation had been put in place in the event that they were not respected.

17. Expanded consultations had been conducted since 1997 with representatives of Aboriginal people, but also with representatives of other

minority groups, during consideration of the Native Title Amendment Act. Throughout that process, in which the Prime Minister had participated directly, the Government had constantly declared itself willing to discuss the draft amendments. Consequently, a number of concerns of indigenous people had been taken into account. Several working groups had been created, in which representatives of native title-holders had taken part and had thus been able to express their views to the members of parliament responsible for amending the 1993 Act.

18. The rights of indigenous people had not been curtailed. All the questions currently being discussed had been raised in the public debate and the parliamentary process on the subject. It was, however, true that the consent of indigenous and Aboriginal people had not been obtained before the adoption of the Native Title Amendment Act 1998. Australia regretted that fact but it should be noted that the Government had attempted to pass the Amendment Act by consensus. That had not been possible and the Government had been obliged to enact the Act as it saw fit. Australia considered that it was also important to ensure a balance between native title rights and other rights, and that it was necessary to take account of the requirements of leaseholders and mining developers.

19. Emphasizing that Ms. McDougall had asked many questions about the relationship between native title and the Racial Discrimination Act, he explained that nothing in the Native Title Amendment Act affected the operation of the Racial Discrimination Act 1975. That issue had been considered by the High Court, which had concluded that, in the event of an incompatibility between an Act containing specific rules and an Act containing general rules, the specific should prevail over the general. In the case in question, the Australian Government considered it necessary to study the specific provisions of the Native Title Act and then look at whether they complied with the Racial Discrimination Act. The Government did not consider that it was appropriate to give precedence to the Racial Discrimination Act over the new section 7 of the 1998 Act.

20. Moreover, Australia was aware of its obligations under articles 2 and 5 of the Convention and the need to recognize the equality of different racial groups. However, Australia, which drew a distinction between substantive equality and formal equality, considered that things that were by nature different should be dealt with differently. It was necessary to evaluate different situations and decide the most appropriate way of dealing with them on a case-by-case basis.

21. Ms. McDougall appeared to believe that the Native Title Amendment Act 1998 discriminated against Australian Aboriginals. The Australian Government totally disagreed with that view. It was, however, true that the balance established by the Mik decision between opposing interests, that is, between native title rights and pastoral leaseholders' rights, was delicate and complex. It was also true that some provisions of that decision, notably those that dealt with validation and exploitation of resources, benefited certain interests and that a different approach could have been adopted. Australia admitted in that regard that it would have been possible to allow the courts greater room for manoeuvre, particularly concerning measures to be

taken in pastoral lease cases. However, the fact that one solution had been preferred to another did not mean that Aboriginals had been victims of any racial discrimination.

22. In his view, it was wrong to say that the Native Title Amendment Act was detrimental to the interests of Aboriginals. On the contrary, the Act had had positive effects for them, given that they could now submit claims, which were generally granted, especially when unconditional land rights clauses were no longer applicable. The 1998 Act authorized the purchase of certain lands, even in cases where land rights had been extinguished. A substantial proportion of the 79 per cent of lands in Australian territory to which Aboriginals were entitled had already been granted and 190 restitution claims had already been submitted. The 1998 Act had also set up several representative bodies to help indigenous claimants to reach agreement with local authorities or mining developers. Those bodies, which were funded by the Federal Government, favoured mediation.

23. New provisions had been adopted because the Government was in favour of reaching agreement on matters of native title. That had meant that activities on pastoral lease lands could be protected but also that Aboriginal title-holders could be compensated if their rights had been affected. Some non-monetary compensation had been granted, such as land benefits.

24. The CHAIRMAN, while welcoming the information provided, said he would have liked the Australian delegation to accord the same importance to the questions asked by Ms. McDougall as to those asked by other members of the Committee at the previous meeting. He gave the floor to members wishing to address comments to the delegation.

25. Mr. van BOVEN said he remained puzzled despite the Australian delegation's explanations. The issues being examined were extremely complex, all the more so because not all the members of the Committee were necessarily familiar with the common law system. He noted that, according to Mr. Orr, native title rights were recognized and protected on 79 per cent of Australian lands, while they were extinguished on the other 21 per cent of the territory. What was the exact nature of the 79 per cent of lands? In other countries - South Africa, the former Rhodesia or countries in Latin America, for example - settlers had taken the best lands and had abandoned the least fertile ones. What was the quality of those lands compared to the remaining 21 per cent?

26. On the question of equality, he said that the Australian Government seemed to be making a distinction between substantive equality and formal equality. The delegation had given a definition of equality that was legally very sophisticated, whereas it would have been better to recognize explicitly that Aboriginals had been marginalized and disadvantaged over the centuries. Their entitlements should be recognized in that light.

27. He pointed out that issues of racial discrimination affected human beings and that it served no purpose to try to hide problems behind semantic nuances.

28. He further noted that, in its recommendations in 1994, the Committee had emphasized the issue of indigenous people's consent for any matters relating to land rights. The representative of Australia had just explained that it had not been possible to obtain such consent and achieve consensus when the Native Title Amendment Act 1998 had been adopted, despite the very lengthy parliamentary procedures and public debate initiated in the country. If that was the case, what role had Aboriginals and indigenous people played in the process? The Australian Government clearly considered that the concept of consent could only be an aspiration, which was not at all the Committee's view.

29. The representative had stated that the Native Title Amendment Act 1998 had two main objectives: on the one hand, to facilitate the restitution of indigenous lands and, on the other, to prevent further extinguishments of native title. That was highly commendable, but what exactly did "facilitate restitution" mean? According to the explanations given by the delegation, it seemed "facilitating restitution" meant that Aboriginals could buy the lands. However, in international law, restitution was a right: in other words, what had belonged to an individual should be restored to him without his having to give something in return. Was that how the Australian Government understood the concept of restitution?

30. The CHAIRMAN, speaking as a member of the Committee, associated himself fully with Mr. van Boven's comments. The lengthy legal explanations given by the Australian delegation had seemed to him too abstract and too removed from the everyday reality of the people concerned. As he had already had occasion to emphasize, the Committee on the Elimination of Racial Discrimination was not a court.

31. He would have preferred the delegation to be more precise on a number of specific points such as, for example, the nature and origin of the pressure being exerted on the Government not to initiate reforms (one supposed that such pressure came from the white population); the practical measures which had been taken to consult Aboriginals and to try to reach a consensus; and the areas in which Aboriginals genuinely enjoyed equal rights - for example, did they enjoy equality in respect of economic and social rights?

32. He feared that the well-informed statement made by the Australian delegation - the high quality of which he incidentally acknowledged - might hide a somewhat worrying reality.

33. Mr. VALENCIA RODRIGUEZ said that the detailed replies given by the Australian delegation had helped the members of the Committee to understand better the position of the Government and the problems it faced. That did not prevent the Australian regime from being considered discriminatory by a whole section of the population and not only by Aboriginals. He would like to know whether the Government would be prepared to hear opponents' arguments and review its position when it came to further reforms. If so, would it also be prepared to embark on fresh consultations to try to reach a consensus with all sectors of Australian society, including Aboriginals? Such a measure would, in his opinion, be the only way of arriving at a satisfactory solution.

34. Mr. SHAHI thanked the Australian Government for its prompt response to the Committee's request for additional information on a very complex legal issue. The report currently being considered and the delegation's statement had clarified the situation considerably.

35. However, he would like to address two points. First, if he had understood correctly, the Native Title Amendment Act 1998 had resulted in the transfer to State and Territory governments of certain responsibilities - notably in the area of land rights - that had previously lain with the Federal Administration of the Commonwealth of Australia. Although it had been stated that decentralization had not affected the consistency of decisions taken on land rights or land acquisition, he had doubts on that score. Consistency and uniformity were key factors in applying the provisions of the Convention.

36. Secondly, the delegation had not really answered the question of whether the Native Title Amendment Act eroded the provisions of the Racial Discrimination Act 1975. On that subject, he read out a passage from the report addressed to the secretariat of the Committee by ANTaR (Australians for Native Title and Reconciliation), a coalition of 300 Australian organizations. On page 15 of the report, it was stated, in essence, that the 1998 amendments had changed the nature of the Native Title Act in terms of applying the Convention. It also stated that the amended Act introduced norms incompatible with the general principles of non-discrimination set out in the Racial Discrimination Act and which implicitly nullified those principles when they were applied to native title rights.

37. The regression that the adoption of the amended Act represented in regard to native title was also analysed in the report by the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner of the Australian Human Rights and Equal Opportunity Commission. The report cited the amended section 7 of the new Act and concluded that it no longer ensured the protection of native title by the general standards of equality and non-discrimination enshrined in the Racial Discrimination Act.

38. The two reports, which corroborated each other, seemed to him very revealing and he would end his comments at that point.

39. Mr. de GOUTTES said that, compared to the concluding observations arrived at by the Committee in August 1994 after consideration of Australia's previous report, there was now a clear and striking change of tone. Those concluding observations had generally praised the State party and, at the time, the High Court's ruling in the Mabo v. Queensland case had been seen as progress. One wondered, therefore, what had happened in the country to cause such a deterioration in a situation depicted as rather encouraging five years earlier. True, in 1994, seeds of discord had already been detected by the Committee, which had criticized the slowness and complexity of the procedures that Aboriginals had to follow in order to have their land title recognized. The Committee had considered that those problems could become a cause for concern. However, the current deterioration of the situation made it permissible to ask whether there had not been a profound change of attitude in Parliament and in public opinion and what pressure had been exerted on the Government to amend its legislation to the detriment of indigenous people.

40. He would have liked the delegation to be more candid and to say more about the general context in which the new laws had been adopted. Many questions remained on that subject.

41. To conclude, he would like to ask the same question as Mr. Valencia Rodriguez: would the Australian Government be prepared to review its position and engage in genuine consultation with the Aboriginals?

42. Mr. YUTZIS said that, although he was not a lawyer, much less a specialist in common law, he had tried to follow closely the legal explanations given by the Australian delegation, because he was sure that the Committee would have to re-examine the subject currently under consideration.

43. Regarding the representation of indigenous communities, he well understood that, given the cultural and historical context, the concept of "informed consent", on which any agreement was usually based, had been almost untenable in practice, as the Government in fact recognized in paragraphs 28 and 29 of the report. However, it was regrettable that the delegation had not provided more details of the criteria for registering with the Native Title Registrar mentioned in paragraphs 34 and 35. It was also unfortunate that the delegation had not elaborated on events during the "intermediate period", even though that period was now over.

44. He noted that the representative of Australia, having initially explained that property titles would be restored to indigenous people when grants expired, had then said that such restitution would happen when exploitation of the land was finished. He would like to know which of the two explanations was the correct one and, if it were the second, who would decide when exploitation was finished.

45. Finally, he would like to have some information on the reasons for the planned abolition of the post of Aboriginal and Torres Strait Islander Social Justice Commissioner.

46. Ms. SADIO ALI said the fact that the Special Rapporteur on contemporary forms of racism, Mr. Maurice Glélé Ahanhanzo, had not been able to go to Australia in 1998 as planned meant that the Committee had little first-hand information on a very complex situation.

47. Therefore, she suggested that the expert responsible for considering the situation in Australia, Ms. McDougall, be invited to go to the country so as to be in a position to give the Committee a detailed report.

48. Ms. McDOUGALL (Country Rapporteur) said she would welcome additional information on one specific point: the Australian delegation had said that native title rights could be restored when a grant expired. She would like to know how long mining grants usually lasted.

49. Mr. Diaconu took the Chair.

50. The CHAIRMAN invited the Australian delegation to respond to the most recent questions.

51. Mr. GOLEDZINOWSKI (Australia) said that, due to shortage of time, his delegation had had to make certain choices and that, since most of the questions asked - particularly by the Country Rapporteur - had related to amendments to legislation, it had given priority to legal explanations.

52. If little had been said about the historical context or what had been called the "intermediate period", that was because those issues had already been dealt with in detail in the previous report submitted to the Committee. It was not at all the fault of the Australian Government but that of the delegation, which had considered that all those points had already been covered.

53. Mr. Aboul-Nasr had wondered whether the Australian Government had given in to the pressure following on the Wik decision. In fact, the very opposite had happened. That decision had recognized that native title rights to pastoral lease lands could still be claimed. The reaction of most Australians had been to demand the extinguishment of native rights and they had put pressure on the Government to legislate to that effect. It was therefore after extensive consultations with all parties, including representatives of the indigenous people, and a political debate of unprecedented scope and duration that the Government had decided to adopt what it had seen as a compromise. The solution had satisfied no one since no consensus, on the part either of the representatives of indigenous people or of their opponents, had been reached, despite the Government's efforts.

54. The amended Act had thus been adopted after the Government had heard everyone's point of view. It was in no way the result of a decision taken by a small group of politicians meeting in a room in Parliament. However, the subject was still topical. It continued to be debated even in the context of the revision of the Australian Constitution taking place to coincide with the centenary of the Federation of the Commonwealth of Australia in 2001. He therefore wished to reiterate that the Act had not been introduced lightly and that it was the culmination of a difficult and lengthy process in which many sectors of the population had taken part.

55. Mr. ORR (Australia), replying to a question from Mr. van Boven, confirmed that the lands to which indigenous people could claim title represented 79 per cent of Australian territory and were generally the most remote and least developed areas, while their title to the remaining 21 per cent, situated mainly along the east coast and making up the richest areas, had been extinguished.

56. Referring to the fact that some members of the Committee would have liked the delegation to recognize the wrong done to indigenous people, he said that such an acknowledgement had been made on many occasions and that he had recognized in his introduction that the extinguishment of Aboriginals' rights had held back the nation's development.

57. He said that lands situated in the 21 per cent of the territory where Aboriginal land rights had been extinguished could be restored to Aboriginals through the Land Fund set up and funded by the Government, which made sums available to indigenous people through the Indigenous Land Corporation, also

set up by the Government, to enable them to buy back land. Moreover, certain provisions in the amended Act also allowed indigenous people to claim a right to land even if that right had been extinguished.

58. In response to Mr. Aboul-Nasr's comment about the legal emphasis of the delegation's replies, he said that the amended Act had raised very complex questions of law and that a legal analysis was necessary in order to give a proper reply.

59. In reply to Mr. Valencia Rodriguez's question, he said that the Government had no plans to review the amended Act but that the Parliamentary Joint Committee on Native Title was responsible for examining the Act's provisions on an ongoing basis.

60. Regarding Mr. Shahi's question as to whether inconsistencies could be caused by the fact that land ownership issues were the responsibility of both the Federal Government and the States and Territories, he said that such issues were traditionally the latter's responsibility. For example, it was the States which approved mining grants. Since the Native Title Act and the amended Act, those issues remained the prerogative of States, although the latter had to observe very strict national rules.

61. With regard to the relationship between the Racial Discrimination Act and the Native Title Amendment Act, he said that, in accordance with Commonwealth law, the provisions of the amended Act had to be applied with due account taken of the Racial Discrimination Act. If, however, an incompatibility arose, the provisions of the amended Act were still applicable. It was up to the Australian Government and the Committee to determine whether the provisions of the two Acts were compatible with each other.

62. In reply to a question by Mr. de Gouttes, he confirmed that profound changes had taken place since the consideration of the State party's previous report, particularly in relations between the Government and indigenous people. It was because the State took account of their interests that it had resisted the pressure to abolish indigenous people's land rights. In so doing, it had fulfilled its obligations under the Convention.

63. Replying to Mr. Yutzis' question on the role of the representative bodies for indigenous people, he said that those organs had been created under the Native Title Act to help indigenous people who wanted to claim a land right and to enable an area of agreement to be found. There were a greater number of provisions relating to those bodies in the amended Act, which should make their task easier.

64. The registration process for land rights claims consisted of two stages. First of all, claimants had to have the validity of their land rights established by an administrative, not a judicial, decision. Next, they could obtain important rights, such as the right to negotiate, the right to be informed of the authorities' activities relating to the land, etc. The aim of the procedure was to enable indigenous people to acquire those rights if their land rights claims were justified.

65. The Intermediate Period Act had been adopted to deal with issues which had arisen between the entry into force of the Native Title Act 1993 and the Wik decision of 1996.

66. On the question of restoring land rights, he said that there were two possible ways in which land rights had been extinguished: either a third party had become the owner of the land by a government decision, or the Government had had, for example, a school or hospital built on the land. Consequently, land rights could be restored to indigenous people if, in the former case, the title-holder wanted to hand over the title to the Government and, in the latter case, if the public building constructed on the claimed land was run-down and the land was no longer used. In both cases, the claimant could submit a request for restitution.

67. He said that the functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner remained the same despite the planned restructuring of the Human Rights and Equal Opportunity Commission, to which the Social Justice Commissioner reported. The other five special commissioners currently in office would cease their activities and only the post of Social Justice Commissioner would be kept. The Commission would ensure that indigenous people could enjoy and exercise their human rights. Moreover, the budget allocated to the Commission would not be reduced.

68. Finally, responding to Ms. McDougall's question about the duration of mining grants, he said that they were issued for 20 or 30 years on average.

69. Mr. GOLEDZINOWSKI (Australia) said that his country would submit its tenth and eleventh periodic reports to the Committee within a few weeks. They would certainly provide answers to questions that the Committee had not had time to raise. He asked the Committee to study the report in detail before drafting its concluding observations on Australia's application of the Convention.

70. Mr. Aboul-Nasr resumed the Chair.

71. The CHAIRMAN invited the Country Rapporteur to sum up the debate.

72. Ms. McDOUGALL (Country Rapporteur) expressed the Committee's appreciation for the seriousness with which the Australian Government had prepared its report and the quality of the dialogue conducted with the delegation, bearing in mind the complexity of the issues addressed.

73. She would like to emphasize certain points, namely that native title represented a traditional and cultural link to the land, recognized by international law, and that, as such, the international community considered any divestment of land to be illegitimate; that Australia had not taken any legislative measures relating to the extinguishment of land rights, which had existed since the distant past; and that the Committee's role was to assess the compatibility of the amended Act with the Convention, regardless of how the Australian Government interpreted the Convention.

74. Finally, she pointed out that the adoption of the Native Title Act had been welcomed when Australia's previous report was being considered because the Act had constituted progress at that time. She wondered if the adoption of the amended Act was a step backwards in that sense.

75. She noted once more that the Committee was dealing with very complex issues which needed to be resolved as a matter of urgency, without waiting for the consideration of Australia's next report. She therefore asked the members to meet to decide how the Committee could continue the debate on native title legislation in Australia after the closure of the current session.

76. The CHAIRMAN commended the Australian delegation on the candour of its statements.

77. The delegation of Australia withdrew.

The meeting rose at 1 p.m.



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Fifty-fourth session

SUMMARY RECORD OF THE 1325th MEETING

Held at the Palais des Nations, Geneva,
on Monday, 15 March 1999, at 3 p.m.

Chairman: Mr. ABOUL-NASR

later: Mr. YUTZIS

later: Mr. ABOUL-NASR

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The meeting was called to order at 3.10 p.m.

CONSIDERATION OF REPORTS, COMMENTS AND INFORMATION SUBMITTED BY STATES PARTIES
UNDER ARTICLE 9 OF THE CONVENTION (agenda item 4) (continued)

Thirteenth and fourteenth periodic reports of Kuwait (CERD/C/299/Add.16
and Corr.1)

1. At the invitation of the Chairman, the members of the delegation of
Kuwait took places at the Committee table.

Mr. RAZZOOGI (Kuwait) affirmed his country's commitment to the
elimination of all forms of racism and racial discrimination and its policy of
promoting the equality of all members of society and guaranteeing all their
rights and freedoms. Article 29 of the Constitution provided that all people
were equal in human dignity and in public rights and duties before the law,
without distinction as to race, origin or language. Kuwait had been one of
the first countries to accede to the Convention and had made the Universal
Declaration of Human Rights a cornerstone of its policy and practice in the
area of human rights. Kuwait had also been prominent in committees on
embargoes against South Africa during the apartheid period.

3. The fourteenth report (CERD/C/299/Add.16 and Corr.1) dealt mainly with
measures taken under articles 2 to 7 of the Convention. With regard to
nationality, he drew attention to the developments referred to in
paragraphs 15 and 16 of the report and to the establishment of an Executive
Committee on illegal residents in the country and the fact that State policy
on the illegal residents known as bidoon, was beginning to bear fruit, as was
exemplified by Decree No. 60/1997 granting Kuwaiti nationality to the children
of martyrs killed during the Iraqi invasion and occupation of Kuwait. He
likewise drew attention to the measures taken for the protection of foreign
labour, particularly domestic servants, described in the report (para. 31).
He observed that, under article 70 of the Constitution, the international
human rights instruments to which Kuwait had acceded had the same status as
domestic legislation and were binding on all the competent authorities. The
International Committee of the Red Cross (ICRC) and the Office of the
United Nations High Commissioner for Refugees (UNHCR) continued to monitor the
conditions of detention and treatment of detainees. He recalled that the
National Assembly had established a Committee for the Defence of Human Rights
to monitor human rights issues (para. 33).

4. His Government had taken a number of new measures and initiatives since
submitting its fourteenth periodic report. With regard to nationality, under
Amiral Decree No. 11/1998 Kuwaiti nationality would be granted to children who
had attained their majority by the time their father had acquired Kuwaiti
nationality. The same applied to adult grandsons and granddaughters through
the male line. Under Decree No. 202/1997, Kuwaiti nationality had been
granted to the children of certain widows of bidoon, in an attempt to solve
some of the pending issues of illegal residents. In order to regulate the
situation of foreign workers, Kuwait had concluded bilateral agreements with
Indonesia, the Islamic Republic of Iran, Morocco and the Philippines. In
1998, Kuwait had become a party to the International Convention against
Apartheid in Sports.

5. In 1995, Kuwaitis had numbered 655,820 - 41.6 per cent of the total population of 1,575,983 - while the remaining 920,163 were non-Kuwaitis. The next census would be conducted in the year 2000. Kuwait ensured that both sections of the population enjoyed security, stability and a decent lifestyle. It also provided free or low-cost health services to Kuwaitis and non-Kuwaitis alike: in 1997, around US\$ 416 million had been spent on health services for Kuwaitis and around US\$ 479 million on health services for non-Kuwaitis. Education and training was also offered to all on an equal basis as could be seen from an annex to the report, on student enrolment; all had the right of access to any public place or service. The right of recourse to the courts was guaranteed by article 166 of the Constitution.

6. In February 1999, the last remaining Jordanians imprisoned for collaboration with the Iraqi occupation authorities had been released.

7. Lastly, he drew Committee members' attention to the violations of the articles of the Convention that had taken place during the Iraqi occupation of Kuwait and discrimination against Kuwaiti prisoners of war in Iraq, who must be released. The Convention must be seen in conjunction with other human rights conventions and international humanitarian law.

8. Mr. YUTZIS (Country Rapporteur) said the large number of representatives in the Kuwaiti delegation was a sign of how seriously the State party took the implementation of the Convention. He complimented the Kuwaiti Government on the regularity of its reports. Referring to Mr. Razzooqi's closing remarks, he said that, in its concluding observations concerning Kuwait's previous report, the Committee had recognized the difficulties that Iraq's occupation had entailed for implementation of the Convention in Kuwait. Iraq's compliance with the Convention should be considered when it submitted its own report.

9. He commended the State party on the progress it had made in the areas of nationality (report, paras. 15 to 17) and the status of foreign labour (para. 31). He also welcomed the establishment of the committees on the habeas and on the defence of human rights, and the abolition of the State Security Court (para. 53). He noted that proportionately more was being spent on health services for non-Kuwaitis than for Kuwaitis.

10. He was concerned, however, that the Government's report referred back to the legal review contained in the previous report (CERD/C/226/Add.5), which had stated that racial discrimination was non-existent in Kuwait and that therefore no direct legislation had been enacted to deal with the phenomenon. The Committee, in its concluding observations, had recommended that Kuwait should revise the Penal Code in order to introduce specific legislation to implement the provisions of article 4 of the Convention (A/48/18, para. 380). If Kuwait maintained its position it would not be complying with all the provisions of the Convention. With regard to article 4 of the Convention, he inquired about the proposed amendments to Kuwait's Penal Code, as described in paragraph 33 (c) of the report, and asked how the new provisions related to non-citizens.

12. In response to the Committee's recommendation that the State party should include demographic information about, in particular, the status of

non-Kuwaiti residents, paragraph 47 merely referred the Committee back to the previous report, which had not given such information either. Referring again to the concluding observations, he noted that naturalized persons had now had been granted the right to vote in national and municipal elections, but he wondered about the status of working people, particularly the unskilled, who in 1996 reportedly numbered about 850,000. Many of them - from Bangladesh, India, the Philippines and Sri Lanka - were in domestic service and, according to information he had received, many were under the age of 18 and had entered the country on false documents.

13. Paragraph 31 of the report listed a number of formal measures to provide foreign workers with legal protection. He would like to know, in addition, what specific measures derived from agreements Kuwait had already signed and what specific measures arose from what had been referred to as the "regulation" of the situation of foreign labour in Kuwait. In both those cases, he asked what laws protected the recruitment of domestic workers, and specifically what type and length of contract they were offered; what the minimum legal wage was and how it was regulated; what health insurance they were offered - particularly in the light of the US\$ 476 million spent on health services for non-Kuwaitis; how many such workers were legal and how many illegal; why foreign workers were able to become union members only after five years and why they had no voting rights even then; and how the exploitation of minors was prevented. He also asked what rights adult immigrant workers and their children had to education.

14. The situation of the bidoon (stateless persons) residing in Kuwait was said to be a primary concern of the authorities (paras. 17 to 23), yet despite the promulgation of Decree No. 221/1993 aimed at dealing with their affairs, their situation remained unclear.

15. According to information he had received from various sources, in preparation for the independence of Kuwait - between 1959 and 1960 - one third of residents had obtained citizenship, one third partial citizenship and the remainder had received only certificates declaring them without citizenship, but had been told they were being considered for citizenship. What had happened with the bidoon at that juncture? Many were in fact nomads and they had been unable to obtain citizenship directly because article 1 of the Kuwaiti Nationality Law of 1959 granted citizenship to those who had settled in Kuwait prior to 1920 and to their descendants through the paternal line - they were first-class citizens. There was also a second class of citizens who had arrived after 1920 and had been naturalized under other clauses, but could also lose citizenship. Because of the bidoon's largely nomadic characteristics, they came within article 25 (d) of a previous version of the Nationality Law which exempted nomads from the need for entry visas and residence permits, allowing them to enter and leave the country at will. That article had later been abolished, and the bidoon who had settled in Kuwait had found themselves undocumented and with no specific nationality. As he interpreted it, they had been unable to obtain citizenship since they had not been able to prove residency. After 1959, bidoon were issued with temporary special travel documents, and were eligible for employment and government services such as health, education and welfare. Many bidoon had worked in the police and the armed forces. However, in 1985 the Government had initiated a policy restricting eligibility for travel documents, and in 1986 public and

private sector employees had all been obliged to produce valid passports, with the result that between 1988 and 1990 thousands of bidoon were dismissed from their jobs.

16. During the Iraqi occupation of Kuwait, bidoon, having no valid passports, had been unable to enter Saudi Arabia and had escaped to Iraq which had allowed them free transit over the borders, but at the end of the war thousands of those stateless persons had remained stranded outside Kuwait and had been refused re-entry. That had still been the case in 1995; could the delegation elaborate on the current situation? What was the current status of the bidoon? How many citizenship applications had been considered and how many identity cards had been issued? How many bidoon were estimated to be living in Kuwait? How many people were currently in deportation centres, and how many of them were bidoon? For how long were they detained without judicial or other proceedings.

17. What measures had been taken to guarantee the rights of the bidoon in such areas as work, health and education, which were all aspects related to article 5 of the Convention? What measures were being taken or considered to avoid situations in which the child of a Kuwaiti woman and a bidoon man was considered stateless, since nationality was only transmitted by the father? How many people were in that situation? Decree No. 60/1997 (para. 23) granted nationality to one category of those children, and he understood that 300 children of Kuwaiti mothers and non-Kuwaiti fathers had been naturalized; but how many remained with no nationality?

18. What legislation was in force with regard to refugees and asylum seekers? What were the procedures for processing requests for refugee status? Certain persons requesting asylum were held in the Talha detention centre; what were the conditions of their detention? How many refugees were there in Kuwait? According to UNHCR, there were around 25,000, including 15,000 Iraqis or persons of Iraqi origin, 8,000 Palestinians and 2,000 Somalis. What specific legal, administrative or other measures had Kuwait taken to regularize the status of those persons and to ensure them adequate conditions of health and education?

19. He asked what practical measures had been taken to implement the provisions of article 7 of the Convention, particularly with regard to the training of law enforcement officers, in the protection of human rights, in conformity with the Committee's General Recommendation XIII and the concerns it had expressed in its concluding observations on Kuwait's previous report.

20. Mr. VALENCIA RODRIGUEZ welcomed the fact that the current report had been drawn up in accordance with the Committee's guidelines and in response to its questions and observations on previous reports. It should be read in conjunction with former reports, since it was only an update, but the Government had provided more comprehensive information in annexes. A firm rejection of all forms of racial discrimination was a pillar of Kuwaiti policy, reflected in its legislation and its administrative and judicial practice, and was a basic value of Kuwaiti society.

21. With regard to the amendment to article 7 of the Nationality Act, recognizing Kuwaiti nationality for children born after their father had

acquired Kuwaiti nationality, he observed that naturalized persons acquired all the rights and obligations pertaining to citizenship and that their children ought therefore to obtain the nationality of the parent without any need for specific legal provisions. What would be the situation of children born before the naturalization of their father but still minors at the time of naturalization of their father, if he wished them also to be recognized as Kuwaiti citizens? The amendment to the Act implied that previously there had been, in practice, a discriminatory policy towards the children of naturalized persons. Although it was not specifically within the purview of the Committee, it should be noted that there was a marked distinction between naturalized fathers and mothers; what would be the situation of children of a naturalized mother?

22. Paragraph 16 mentioned amendments granting naturalized persons the right to vote. That right, too, was normally inherent in citizenship, but it appeared from the amendments that that had not previously been the case, from which it followed that discrimination against naturalized persons had existed with regard to voting.

23. He welcomed the measures taken to regulate the situation of illegal residents, particularly through the creation of a Central Committee. More information was needed on the results of such measures, since the Committee was in favour of resolving the situation of illegal residents through legislative and administrative measures which recognized both the rights of the State to admit foreigners and the fundamental human rights which every human being should enjoy. He welcomed the explanation of the term bidoon and the information provided on the actions of the bidoon during the Iraqi occupation of Kuwait. It was gratifying to note that measures had been taken with regard to foreign workers, particularly domestic workers, since that had been one of the Committee's concerns. It hoped to receive more information about progress in that field, particularly given the statement in paragraph 32 that the State studied and took into consideration the comments made by the international humanitarian and other organizations with which it cooperated.

24. With regard to implementation of article 4 of the Convention, he asked what stage the bill amending various provisions of the Kuwaiti Penal Code (para. 33 (c)) had reached; the changes should bring Kuwaiti legislation more into line with the requirements of article 4.

25. Noting with satisfaction Kuwait's accession to many international human rights instruments and that international treaties to which Kuwait was party had the same status as domestic law and were binding on all authorities, he asked whether it was also possible to invoke them before the courts.

26. There had apparently been no court cases during the period covered by the report, but he trusted that the Government would inform the Committee of any future cases. He welcomed the news that the State Security Court had been abolished and that the cases previously within its competence had passed to the jurisdiction of ordinary courts.

27. He commended the measures taken, both directly by the State and through encouragement to private initiatives, to assist in the economic and social development of other countries, particularly those in the region, which

reflected a policy of promoting cooperation and international understanding. He hoped for a prompt end to the unfortunate consequences of the invasion by Iraq which had constituted violations of the Convention and humanitarian law.

28. Mr. SHERIFIS extended a particular welcome to the head of the delegation, a former member of the Committee. Kuwait's regular reporting and the size of its delegation testified to Kuwait's desire to maintain a positive dialogue with the Committee. He recognized Kuwait's anti-apartheid stance but drew the delegation's attention to the Committee's broader interpretation of article 3 of the Convention in its General Recommendation XIX (95), particularly paragraph 3 on racial segregation, and its invitation to States parties to monitor all such trends, to work for the eradication of any negative consequences and to describe any such action in their periodic reports. He hoped that the State party would take account of those comments in its future reports, particularly in the light of its stated willingness to act on its dialogue with the Committee.

29. He asked whether Kuwait had initiated the procedure for ratification of the amendment to article 8, paragraph 6 of the Convention; if not, he suggested that it did so. He also asked whether it might consider making the optional declaration under article 14.

30. As a result of the invasion of Kuwait there had been many refugees and displaced persons in the country. Drawing attention to the Committee's General Recommendation XXII (96), he asked whether there were still persons who had been unable to return to their homes in Kuwait and whether all those who had returned had had their property restored to them or received appropriate compensation.

31. He welcomed Kuwait's rejection of racial discrimination and segregation (para. 12) and the proposed addition of two articles to Act No. 16 of 1960 (para. 33 (c)), bringing legislation into closer conformity with article 4. With regard to implementation of article 7, the report simply referred back to the twelfth report.

32. He asked whether the goals, objectives and contents of the Convention and the contents of the reports submitted to the Committee were publicized in Kuwait and whether the comments of members of the Committee and the concluding observations were published. Had Kuwait established or considered establishing a national institution to facilitate implementation of the Convention pursuant to General Recommendation XVII (93)? If not, he hoped it would consider establishing such an institution. He looked forward to further information, either orally or in the next report.

33. Mr. NOBEL said that some necessary information was missing from the report. Regarding specifically the demographic composition of the country, the World Directory of Minorities reported that Kuwaitis did not account for a large percentage of the overall population, which contained many other groups; it would be useful to have a population breakdown.

34. Clarification was needed, for instance, of the status of the bidoon, whether they maintained a nomadic lifestyle and whether there were elements of Beduin among them. Amnesty International had reported in its previous annual

report that a parliamentary committee had been created to look into the legal situation of the more than 100,000 stateless persons belonging to so-called bidoon society, and that the bidoon population was growing, to the extent that bidoons would number 200,000 by the year 2006. In his report on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (E/CN.4/1997/71/Add.2), the Special Rapporteur of the Commission on Human Rights had concluded that the question of the bidoon should be settled once and for all in an equitable and humane fashion and that such persons should be guaranteed access to social services (paras. 68 and 69 (a)).

35. The report was encouraging, relating as it did the significant efforts to resolve the problems of discrimination. Many committees and institutions were being established, but the Committee would like to know what they had achieved in practice and what the results had been at the grass-roots level for those affected by discrimination. What were the prospects for the future work of those institutions?

36. Paragraph 18 of the fourteenth periodic report said that in 1993 a Central Committee had been established, but that it had been replaced in 1996 by the Executive Committee. Why had the Central Committee been disbanded? Had it failed to achieve its objectives? What action had been taken since then?

37. Paragraph 20 referred to the issue of cards, presumably identity cards. How many had been issued and to whom? What conditions had to be met to be eligible for such a document, and what was the situation of those who did not have one?

38. Paragraph 21 was not sufficiently explicit: it would be useful to know the number of cases dealt with by the subcommittees of the Executive Committee and how many were still pending. Concerning paragraph 22, the Committee would like more specific information on how the Executive Committee was endeavouring to solve the problem of illegal residents.

39. Regarding the issue of domestic servants, it was encouraging that a Department had been established to monitor labour questions and to intervene to settle disputes between employers and employees (para. 31 (e)). How many cases had been filed with that agency, and how had they been settled? Was it really possible for any domestic employee to have recourse to such a remedy?

40. Mr. Yutzis took the Chair.

41. Mr. de GOUTTES said that, after difficult years following the invasion of Kuwait by Iraq and the resulting obstacles to full implementation of the Convention, the Committee had awaited Kuwait's latest report with particular interest, but the fourteenth report had been somewhat disappointing and had not supplied sufficient information on at least two fundamental points. On demographic composition, the reference in paragraph 47 to the twelfth report was not helpful, because that report had not contained any specific demographic data either. It was to be hoped that the next census would enable the delegation to provide more information. On the implementation of articles 2 to 7 of the Convention, paragraph 49 likewise mentioned the 1993 report, yet the information therein was over five years old. In August 1996 the Committee

had already requested information on measures taken to protect vulnerable groups of foreigners, in particular Palestinians, stateless Arabs, Iraqis and nationals from countries which had not been part of the anti-Iraq coalition, as well as on the treatment of national and foreign domestic workers.

42. He sought further details on the three positive initiatives mentioned in paragraph 33: the establishment of a Committee for the Defence of Human Rights; the formation of a working group to look into human rights issues; and the tabling of a bill amending various provisions of the Penal Code through the addition of two articles, one prohibiting incitement to, or acts of, discrimination and the other stipulating that such discrimination was a punishable offence for any public official. What had been the impact of those initiatives on the fight against racial and ethnic discrimination?

43. Mrs. ZOU said that paragraph 10 (b) of the country report acknowledged that the Committee required further demographic data, but the report did not contain any such information. In his oral introduction, however, the representative of Kuwait had himself given several figures, from which it emerged that there were more non-Kuwaitis than Kuwaitis living in the country. What was the percentage of different groups among non-Kuwaitis?

44. Paragraphs 24 to 30 discussed the status of women, but it was not clear to her whether women had the right to vote. In the introduction to the 1993 country report, the Kuwaiti delegation had stated that the Kuwaiti Government had been considering giving women that right. As far as she knew, in the past Kuwaiti women had not been allowed to own property. Was that still the case?

45. In paragraph 23, it was stated that children of martyrs classified as hidoon could acquire Kuwaiti nationality. Given that applications were decided on a case-by-case basis (para. 21), how many persons had actually been granted Kuwaiti citizenship?

46. What was the current situation of foreign women domestic servants, a particularly vulnerable group, with regard to their language, culture and religion? For example, could women workers from the Philippines, many of whom were Catholic, attend services in a Catholic church? There had been media reports that many of those women were discriminated against or even persecuted. How many such cases had come to the courts, and what judgements had been handed down? Were the children of foreign workers residing in Kuwait entitled to equal treatment in schools?

47. The fourteenth report contained many gaps, for instance on implementation of articles 4, 6 and 7 of the Convention. It was to be hoped that Kuwait's next report would be prepared in accordance with the Committee's guidelines.

48. Mr. DIACONU said that it was encouraging to learn about the new legislation passed in Kuwait to implement the Convention. Given that the number of foreigners living in Kuwait exceeded the total population of Kuwaitis, measures to prevent racial discrimination were of the utmost importance. According to paragraph 20, the question of rectifying the situation of illegal residents was to be resolved case by case, and criteria had been adopted for that purpose. What were those criteria?

49. Concerning article 4, he noted that the Constitution declared equality for all before the law without distinction of race, origin or language. That presumably included ethnic origin, which would thus meet the requirements of the Convention. But in the Penal Code, there was no specific provision prohibiting acts of racial discrimination as required under article 4. Likewise, he saw that legislation prohibited associations from intervening in religious or political conflicts or provoking discord or sectarianism. He was not sure whether that covered the provisions of the Convention concerning organizations which promoted or incited racial discrimination. In any case, Kuwaiti law did not prohibit the actual existence of such organizations and hence did not comply with the requirements under article 4.

50. He noted with interest that Kuwait had ratified 114 conventions relating to labour rights, more than most other States, and that was to be commended. Did that list include ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation, as well as those on trade-union rights and on collective agreements?

51. He welcomed the bilateral agreements which Kuwait had concluded with the countries of origins of many of the immigrant workers. But the report was silent on the Palestinians. During the discussion of the twelfth periodic report, the Committee had noted that the majority of foreign workers in Kuwait were Palestinians. Why had no agreement been concluded with the Palestinian Authority to protect their labour rights? Could information be provided on the situation of Palestinian workers in Kuwait with regard to such rights as the right to work, to health care and to education?

52. Mrs. SADIO ALI said that, according to reports, Iraq had granted an amnesty to all Arab prisoners in Iraq. Kuwait and other sources claimed that there were still Kuwaiti prisoners of war in Iraq. What was their position, or had they been released?

53. She asked what Kuwait's response had been to the findings and recommendations of the Special Rapporteur of the Commission on Human Rights on contemporary forms of racism, racial discrimination, xenophobia and related intolerance concerning migrant workers, in particular domestic workers of Indian, Sri Lankan, Bangladeshi and Philippine origin, whose rights were denied and on the bidoon, stateless persons and illegal residents.

54. Regarding paragraph 31 (f), how did the agreements drawn up with a number of labour-exporting States protect the rights of workers from those countries?

55. Mr. GARVALOV said that the report had not been prepared in accordance with the Committee's guidelines and thus gave the impression that no specific data had been provided on implementation of articles 2 to 7.

56. It emerged from the report that the problem of the bidoon had not been entirely resolved. On that issue, the 1997 World Directory of Minorities of the Minority Rights Group International alleged that the bidoon had been accused of collaborating with the Iraqis during the Gulf war, that many had been tortured or executed or had "disappeared", that Kuwait was attempting to

expel them, including those serving in the armed forces, and that private schools had been ordered not to accept bidoon children. Could the Kuwaiti delegation provide some clarification on those allegations?

57. The Minority Rights Group International also maintained that the 23,000 Palestinians currently in Kuwait (400,000 prior to the Gulf war) were denied civil rights and the right of domicile. Could the Kuwaiti delegation comment on that assertion?

58. With regard to women, the fourteenth report failed to answer questions raised during consideration of Kuwait's twelfth periodic report about whether women working in Kuwait as domestic servants, who were mainly of Asian origin, had been the victims of racial discrimination; he hoped that further information could be provided.

59. The Committee would like to know whether the Convention could be invoked directly before a court of law or whether that required the adoption of special legislation.

60. The report failed to provide data on the demographic composition of the Kuwaiti population and on whether Kuwait still maintained its earlier position that there was no racial discrimination in the country.

61. Mr. Aboul-Nasr resumed the Chair.

62. Mr. van BOVEN said that the impressive size and status of the delegation made it easier for the Committee to enter into a meaningful dialogue with the State party.

63. The Special Rapporteur of the Commission on Human Rights on contemporary forms of racism, racial discrimination, xenophobia and related intolerance had drawn attention in document E/CN.4/1997/71/Add.2 to the heavy dependence of the Kuwaiti economy on foreign labour, and to the fact that the 850,000 or so unskilled workers from Bangladesh, India, the Philippines and Sri Lanka who were employed primarily in homes, by cleaning firms and in the petroleum industry, experienced the greatest number of problems, in the form of ill-treatment, non-payment of wages or sexual abuse. There had been no legislation governing the recruitment of domestic workers when the Special Rapporteur had visited the country in late 1996. However, paragraph 31 of the Kuwaiti report described recent measures aimed at improving the situation of domestic workers. Ministerial Ordinance No. 115 of 1996 had promulgated statutes regulating private recruitment agencies, which often earned huge profits from trafficking in workers. Could he take it, therefore, that the Special Rapporteur's findings were no longer applicable? The situation of domestic workers must be closely monitored because they were exposed to an aggravated form of discrimination involving both racial discrimination and gender issues. He asked the delegation to inform the Committee of the gist of annex 8 to the report containing Kuwait's reply to a complaint concerning domestic workers submitted by a Philippine organization in Australia to the Centre for Human Rights in Geneva. He would also welcome more detailed information, perhaps in the next periodic report, on the Department to Regulate Recruitment Agencies, referred to in paragraph 31 (e) of the report.

64. The Special Rapporteur had recommended that priority should be given to finding a definitive, humane and equitable solution to the problem of the bidoon, some of whom appeared to be stateless in their own country, and to guaranteeing them access to social services. The International Labour Organization (ILO) had requested the Government to provide information on measures taken to implement the Special Rapporteur's recommendation and the Committee hoped to be informed of such action in Kuwait's next periodic report.

65. While he welcomed Kuwait's replies in Part III of the report to the comments and questions of members of the Committee, he would have appreciated a more detailed response to the Committee's concluding observations on Kuwait's previous report. For example, more concrete information was needed on action to eliminate discrimination deriving from the dual system of citizenship. The Committee had also recommended that the Penal Code should be revised in order to introduce specific legislation to implement the provisions of article 4 of the Convention in accordance with the Committee's General Recommendations VIII and XIV. The bill amending the Penal Code referred to in paragraph 33 (c) of the report prohibited incitement to discrimination on a number of grounds that did not include race. It also referred only to citizens although non-citizens were more vulnerable to acts of discrimination. A second proposed amendment made it a punishable offence for any public official to fail to respect the full equality of the persons with whom he dealt, provided that their circumstances and legal status were similar. He asked for clarification of the meaning of the phrase beginning "provided that" and pointed out that discrimination by private persons should also be prohibited in accordance with article 2 of the Convention.

66. The Committee had further recommended that the right of recourse in courts should be guaranteed to victims of discrimination and that law enforcement personnel should be given adequate training in human rights norms in the light of General Recommendation XIII. There had been no follow-up in the report to either of those recommendations.

67. He joined Mr. Sherifis in urging Kuwait to make the declaration under article 14 of the Convention and to ratify the amendment to article 8.

68. The CHAIRMAN, referring to the Committee's request for demographic data, said he had received a document, submitted by Kuwait to the secretariat on 29 January 1999, containing full and impressive statistics.

69. The delegation of Kuwait withdrew.

Draft concluding observations concerning the thirteenth and fourteenth periodic reports of Finland (CERD/C/54/Misc.28/Rev.1; future CERD/C/...)

Paragraphs 1 and 2

70. Paragraphs 1 and 2 were adopted.

Paragraph 3

71. Mr. GARVALOV proposed that the second sentence should be amended to read: "At the regional level, Finland has ratified the Framework Convention of the Council of Europe for the Protection of National Minorities"

72. Paragraph 3, as amended, was adopted.

Paragraphs 4 to 10

73. Paragraphs 4 to 10 were adopted.

Paragraph 11

74. Mr. SHAHI proposed replacing "Romani" by "Roma"

75. Paragraph 11, as amended, was adopted.

Paragraph 12

76. Paragraph 12 was adopted.

Paragraphs 13 and 18

77. Mr. van BOVEN said he was unsure whether the issue raised in paragraph 13 came within the scope of the Convention. He proposed that the paragraph be deleted.

78. Mr. SHERIFIS (Country Rapporteur) said that Finland was one of only 10 Member States of the United Nations that applied a refugee quota system. He would prefer to keep the reference if Mr. van Boven could reword the paragraph in such a way as to establish a link with the Convention.

79. Mr. YUTZIS noted that paragraph 18 dealt with the same subject.

80. Mr. van BOVEN said that once the quota established under a quota system was reached, States tended to refuse any further intake of refugees although there might be good reasons for admitting more.

81. He proposed deleting paragraph 13 and adding the following sentence to paragraph 18: "It is recommended that the quota system be applied without any discrimination based on race or ethnic or national origin."

82. Mr. NOBEL said that the refugees accepted under the quota system were those for whom UNHCR had found it particularly difficult to arrange asylum.

There was a tendency, however, to select particular ethnic groups when choosing refugees to fill the quota. He supported Mr. van Boven's proposal.

83. Mr. SHERIFIS (Country Rapporteur) said he agreed with Mr. van Boven's proposal to delete paragraph 13. He suggested that paragraph 18 be reworded to read: "Efforts should be made to increase the number of quota refugees, without discrimination based on ethnic origin".

84. Mr. DIACONU disagreed with Mr. Sherifis's proposal because it limited the requirement of non-discrimination to any increase in the quota.

85. The CHAIRMAN said he took it that the Committee wished to delete paragraph 13. He suggested that paragraph 18 should be left pending while Mr. van Boven and Mr. Sherifis worked out a mutually acceptable formulation.

86. It was so agreed.

Paragraphs 14 to 16

87. Paragraphs 14 to 16 were adopted.

Paragraph 17

88. The CHAIRMAN suggested inserting the phrase "In accordance with article 5 (f) of the Convention" at the beginning of the paragraph and deleting the phrase "contrary to article 5 (f) of the Convention" at the end.

89. Paragraph 17, as amended, was adopted.

Paragraphs 19 to 22

90. Paragraphs 19 to 22 were adopted.

91. The draft concluding observations concerning the thirteenth and fourteenth periodic reports of Finland as a whole, as amended, were adopted, subject to the rewording of paragraph 18.

The meeting rose at 6 p.m.